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United States

OCTOBER TERM, 1975

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS JOHN VAN GELDERN, ET AL., REAL PARTIES IN INTEREST

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BRIEF OF RESPONDENTS JOHN VAN GELDERN, ET AL., REAL PARTIES IN INTEREST

QUESTIONS PRESENTED

Pursuant to Rules 34 and 37, F. R. Civ. P., the District Court ordered defendants to produce certain documents for inspection by plaintiffs' counsel, subject to the terms of a protective order. Although defendants had resisted production on the ground that the documents were privileged, no claim of privilege was ever lodged by the Director of Corrections or by the Chairman of the Adult Authority; rather,

"petitioners' counsel merely raised a blanket objection covering any and all documents * * *" (App. 719). In denying defendants' petition for a writ of mandamus, the court below did not reach the question of whether the claimed privilege extends to the documents in issue, or if *in camera* inspection was necessary before allowing disclosure, holding only that "[t]he governmental privilege must be formally asserted and delineated in order to be raised properly." App. 717. The questions presented are:

1. Where a government agency objects to the production of documents pursuant to Rule 34, F.R. Civ. P., on the ground that they come within the qualified privilege for official information, is it an abuse of discretion for the District Court to require that the claim of privilege:

a. Be formally asserted by the head of the department which has control over the documents, after actual personal consideration by that officer;

b. Include a specific designation of the documents or class of documents at issue;

c. State with specificity the rationale of the claimed privilege; and

d. Describe the particular harm which is in fact likely to occur if the documents are inspected by counsel for the discovering party?

2. Where a government agency objects to the production of documents pursuant to Rule 34, F.R.Civ. P., on the ground that they come within the qualified privilege for official information, is it an abuse of discretion for the District Court to deny the agency's

request for *in camera* inspection of those documents if (a) the agency has failed to make the showing described in question 1, *supra,* and to show that such an inspection is feasible, or (b) the court correctly concluded that the need for the documents in the litigation outweighs the damage which is likely to result from their disclosure?

3. Whether, under all of the circumstances of this case, the District Court properly concluded that plaintiffs' need to inspect the documents in question outweighed the harm which defendants were likely to incur if such inspection took place in accordance with the protective provisions of the orders compelling discovery.

4. Whether a government agency has standing to assert, for itself or on behalf of unnamed individuals from whom it has received information, a Fourth Amendment privilege not to produce documents in response to a request therefor under Rule 34, F.R. Civ. P., where (a) no showing has been made with respect to who those individuals are, what information has been received from them, or what harm would come to them from the disclosure; (b) the individuals have voluntarily furnished the information to the agency; (c) the information is to be used by private parties in litigation against the agency; and (d) the trial court has concluded that the need for the documents in the litigation outweighs the damage which is likely to result from their disclosure.

STATEMENT OF THE CASE

It is plaintiffs' submission that a proper resolution of this case depends upon an understanding of how the California Adult Authority—the state's parole board—operates in administering California's indeterminate sentencing law. Although the board's most visible function is the holding of hearings to determine whether to fix an inmate's term and grant parole, the board also performs an equally important function in adopting and modifying the sentencing and paroling policies which it will follow. Therefore in this opening statement of the case we shall first describe the manner in which the Adult Authority operates in setting policy and holding hearings, and thereafter summarize the complaint and the relevant events which occurred in the courts below.

1. How the Adult Authority Administers the California Indeterminate Sentencing Law.[1]

A. The California Indeterminate Sentencing Law.

In California, a trial judge may not set any specific term of imprisonment; instead, he is required (if

[1]Although the Adult Authority's procedures are constantly changing, authoritative descriptions of how that agency has operated during the past six years may be found in California Criminal Law Practice (Cont. Ed. Bar, 1969), Ch. 23, pp. 445-618 (written by a former member of the Adult Authority) [hereinafter referred to as "CEB"]; Parsons-Lewis, Due Process in Parole-Release Decisions, 60 Cal. L. Rev. 1518, 1521-37 (1972); and Note, California Department of Corrections and Adult Authority Decision-Making Procedures for Male Felons, 26 Stan. L. Rev. 1353, 1364-71 (1974). Effective March 1, 1975, some new criteria were promulgated by R. K. Procunier, recently appointed Chairman of the Adult Authority (see note 14, *infra*), which have been published in The State Bar of California, Report and Recommendations on Sentencing and Prison Reform (June 1975) at 89-102, and which are sometimes referred to hereinafter as the "Procunier System." In addition to the foregoing references, descriptions of how the board proceeds, in adopting policy and conducting hearings, are found in the depositions of various defendant Adult Authority members by plaintiffs' counsel which, although not contained in the Appendix filed in this Court, are part of the record in the District Court. These descriptions cover both the pre-March 1975 procedures as well as the Procunier System. The fact that a procedure once followed has since been modified is of limited significance, since it can be easily changed back overnight, either by a directive issued by the Chairman of the Adult Authority (see note 14, *infra*) or by adoption of an Adult Authority Resolution or Policy Statement, which under California law may be enacted without complying with the state's Administrative Procedure Act or any other statutory requirement (see note 7, *infra*).

imprisonment is to be imposed at all) to sentence the defendant to the term prescribed by law. See California Penal Code §1168 (West 1970). Most crimes in California carry minimum and maximum terms of great disparity (e.g., one year to life for molestation of a minor, *id.* §288; one to twenty-five years for kidnapping, *id.* §208), and it is within these ranges that the Adult Authority fixes the prison term that the inmate must actually serve. Penal Code §3020. However, maximum terms provided in the Penal Code bear little relation to the median terms actually served, since "the Adult Authority in the great majority of cases releases prisoners long before their maximum terms * * *." STATE OF CALIFORNIA, JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, TENTATIVE DRAFT, No. 2, 17 (1968). Thus the judicial imposition of a life sentence, for example, "is no more than a legislatively mandated device for transferring the sentencing function from the State courts to the State administrative agency with a grant of jurisdiction over * * * [the inmate's] person for a period sufficiently long to enable the agency to perform its

functions under the State's indeterminate sentencing laws." *Sturm v. California Adult Authority*, 395 F.2d 446, 449 (9th Cir. 1967), *cert. denied*, 395 U.S. 947 (1968) (Browning, J., concurring).

B. The Composition of the Adult Authority.

The Adult Authority is composed of nine full-time members appointed by the governor. Penal Code §5075. Although Penal Code §5075 provides that "members shall be selected who have a varied and sympathetic interest in corrections work including persons widely experienced in the fields of corrections, sociology, law, law enforcement, and education," virtually every member of the present board is an ex-law enforcement or ex-correctional officer.[2] These members are assisted by so-called hearing representatives, who are appointed by the Chairman of the Adult Authority (deposition of defendant Kerr, January 9, 1973, [hereinafter referred to as the "Kerr Deposition"] at 8) and who perform virtually the same functions in conducting term-fixing hearings[3]

[2]See Mitford, Kind and Usual Punishment; The Prison Business (Alfred A. Knopf, 1973) 86; see also depositions of the following defendants, to wit: Kerr Depositions at 4; Ray C. Brown, June 11, 1974 at 4; Hoover, April 5, 1974 at 4-5; Lopez, June 20, 1974 at 4; Lynum, June 17, 1974 at 4; Rushen, May 2, 1975 at 4; Charles Brown, June 14, 1974 at 5; Procunier, May 15, 1975 at 3-4.

[3]Hearings are also held to determine whether or not to rescind or revoke parole. Although these hearings were the subject of plaintiffs' original complaint, plaintiffs' second amended complaint, filed July 1, 1975, is concerned solely with the term-fixing, parole-granting hearings discussed in the next subsection of this Statement of the Case. Therefore the remainder of this Statement, as well as the brief itself, will be limited to this type of hearing.

as do members, except that they are limited to making recommendations which must subsequently be approved by two members in order to be effective (*id.* at 8-9). In fact, recommendations of hearing representatives are almost always approved. Deposition of defendant Hoover, April 5, 1974, at 14-15; Kerr Deposition at 33.

C. Term-Fixing, Parole Release Hearings.

Whenever the Adult Authority fixes an inmate's term it virtually always grants parole at the same time, although it is under no legal obligation to do so. Defendants' Answer to Plaintiffs' Request for Admission of Facts and Genuineness of Documents, August 14, 1974 [hereinafter referred to as "Request for Admissions"] Statement and Answer No. 1. We shall, therefore, use the terms "term-fixing hearings" and "parole release hearings" interchangeably throughout this brief, since that usage accurately reflects the nature of the hearings which defendants conducted during all times material to this case.[4]

[4]However, in the recent case of *In re Rodriguez*, 14 Cal.3d 639, 537 P.2d 384 (1975), the California Supreme Court held that the Adult Authority must promptly fix a "primary term", which "must reflect the circumstances existing at the time of the offense." *Id.* at 652. Subsequently, the Adult Authority may conduct its usual determination as to whether or not to parole an inmate prior to the expiration of the primary term. At this writing, it is unclear whether the sentencing and paroling functions of the board will be performed at the same or separate hearings, although the Adult Authority will retain its full power to determine both issues. And in determining an inmate's readiness for parole, *Rodriguez* expressly affirms the Adult Authority's power to consider "a prisoner's good conduct in prison, his efforts toward rehabilitation, and his readiness to lead a crime-free life in society." *Id.* at 652.

Term-fixing hearings are generally conducted at the prison where the inmate is confined by a two-person panel of Adult Authority members and/or hearing representatives. Kerr Deposition at 12-14. These hearings are relatively short: plaintiffs have alleged that the median time is less than 10 minutes, and that decisions are reached quickly, "without any extended or meaningful discussion of the case." App. 10; see also Kerr Deposition at 27 (decision reached in 2 to 5 minutes); CEB at §25.133. The only written material which is before the panel are documents compiled from the inmate's central file, and in particular (1) information concerning the circumstances surrounding the commitment offense, (2) an individual diagnostic study prepared at the time the inmate was initially received by the California Department of Corrections (hereinafter referred to as the "CDC"), and (3) additional documents which reflect various aspects of the inmate's prison record. Kerr Deposition at 17-25; CEB §23.82 et seq. Usually the only person present during these hearings, apart from the panel members and the inmate, is a "correctional counselor" who acts as a clerk who attempts "to capture the essence of the interview, the man's demeanor and apparent attitude." Kerr Deposition at 15, 27. In most cases one panel member reads the next inmate's file while the other panel member conducts the interview with the inmate then in the hearing room. *Id.* at 18. At the end of the hearing, the panel members immediately decide whether or not to fix the inmate's term and grant parole, and then commence their interview with the next inmate on the list. *Id.* at 26-27.

There are no statutes or written regulations which set forth the criteria to be used in deciding whether or not to fix a term and/or grant parole. Defendant Edman's Response to Plaintiffs' Request for Admission of Facts and Genuineness of Documents (Second Set), No. 85, March 17, 1975. Similarly, there are no written rules of evidence or procedure which panel members must follow in conducting the hearings (deposition of defendant Gordon, June 14, 1974, at 20; deposition of defendant Ray Brown, June 11, 1974, at 21). Although inmates now have a limited right to review their central files prior to a hearing, departmental regulations permit prison caseworkers to withhold many documents from the inmates which, for a variety of reasons, are considered "confidential". App. 606-46. Inmates may not be represented at the hearing by any other person, including retained counsel, nor may they call or cross-examine witnesses, challenge any panel member for bias, or obtain a written transcript of the hearing. Deposition of defendant Hoover, April 5, 1974 at 65; Request for Admission, No. 135. Nor, as a practical matter, is the panel's decision subject to judicial review.[5]

So far as the result of these hearings is concerned, official CDC documents show that the percentage of paroles granted by the Adult Authority rose sharply from 30% to 50% in early 1970; rose sharply from 45% to 70% in late 1971; dropped sharply from 70% to 40% in late 1971 and early 1972; continued to drop until in May of 1973, "[f]or the first time in over

[5]See note 27, *infra*.

five years, fewer than 20% of the male felons heard by the Adult Authority received release dates." See Appendix A hereto. However, between January and March of 1975, with the change of Administrations, the appointment of a new Adult Authority Chairman and a consequent "change in policy," the percentage of release dates soared from 30% to 88%, "the highest ever." See Appendix B hereto.[6]

D. Policy-Making Functions.

State statutes are silent not only with respect to the criteria or procedures which are to govern Adult Authority hearings, but also as to how Adult Authority policies are to be adopted. Moreover, it has been expressly held that the Adult Authority, in adopting and promulgating its rules and regulations, is not subject to the California Administrative Procedure Act.[7] Therefore the Adult Authority is entirely free

[6]Appendix A is a memorandum written to the Director of Corrections and the Chairman of the Adult Authority by the Senior Statistician of the Department of Corrections, dated May 11, 1973, together with a graph which was annexed thereto as Chart 1. Appendix B is a similar memorandum dated April 23, 1973, together with a graph which was also attached as Chart 1 thereto.

[7]In *American Friends Service Committee v. Procunier*, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973), the court held that neither the Department of Corrections nor the Adult Authority is required to adopt or promulgate its rules or regulations in accordance with the California APA. Thus the so-called Resolutions and Policy Statements, which to some extent govern the Adult Authority, are adopted, modified, and revoked by a majority vote of each body for any reason or no reason at all (Deposition of defendant Kerr, dated January 22, 1973, at pp. 2-7). Moreover, sweeping changes in policy, resulting in a striking change in the rate of paroles granted (see Appendix B), have recently been promulgated solely by the Chairman of the Adult Authority. See note 14, *infra*.

to—and does—independently determine its own policies.

Some such policies are set forth in so-called "Policy Statements" or "Resolutions", which are adopted by a majority vote of the board and thereafter published. Deposition of defendant Kerr, January 22, 1973, at 2-7. Other policies, notably the new Procunier System, are set forth in directives issued by the Chairman of the Adult Authority. See note 14, *infra*. Other policy decisions, which are never promulgated in written form, are announced or adopted at secret executive meetings of the Adult Authority, which are held monthly in Sacramento. Still others—such as the policy forbidding an inmate to be represented by counsel—have simply been informally adopted over time. Kerr Deposition at 16-17. And although the official Resolutions and Policy Statements are available to the public, there is no such public access to decisions reached in executive sessions, or to directives contained in intra-agency memoranda, which are considered "confidential" by the Adult Authority. See App. 68; Defendants' Brief at 34-35.

2. Summary of the Complaint.

Plaintiffs are persons who, at the time the complaint was filed, were prisoners in custody of the CDC. On August 1, 1974, the District Court entered an order that the action is to be maintained as a class action under Rule 23(b)(2) F.R.Civ.P., on behalf of all prisoners and parolees in the custody of the Department of Corrections. App. 371, n. 1. Defendants in the District Court—who are the petitioners in this

Court—are the members and the Administrative Officer of the Adult Authority and the Director of the Department of Corrections.

In their complaint, plaintiffs allege that the hearing practices actually followed by the Adult Authority "are in fact completely lacking in both procedural and substantive due process, and in rudimentary fairness or equity," and that as a result of such defective procedures, the decisions routinely reached by the Adult Authority are "so arbitrary, discriminatory and otherwise illegal" as to violate plaintiffs' constitutional rights. App. 10-11. Specifically, plaintiffs allege that inmates are prohibited from reviewing their central files prior to the hearings (App. 10);[8] are not permitted to be represented by retained counsel (*ibid.*), and are not given written reasons for the decisions or the evidence relied upon (*ibid.*).[8] Plaintiffs further allege that the hearings themselves are defective because (i) the panel members do not have sufficient time to review the written material before them, to conduct a meaningful interview with the inmate, or to arrive at an informed decision (*id.* at 41); (ii) "many inmates are so fearful, tongue-tied or lacking in the ability to organize and articulate their position that they are unable to make an effective presentation of their case, or even on occasion

[8]Subsequent to the filing of plaintiffs' initial complaint, and in each case as the result of a judicial decision, defendants modified their procedures to give inmates (1) a limited right to view their central files (subject to the withholding of certain documents by the CDC as "confidential"), see *In re Olson*, 37 Cal.App.3d 783, 112 Cal.Rptr. 579 (1974), and (2) a written statement of reasons whenever parole was denied, see *In re Sturm*, 11 Cal.3d 258, 521 P.2d 97 (1974).

to respond accurately to questions posed by the panel" (*ibid.*); (iii) the written material relied upon by panel members is often false and misleading and is placed in an inmate's central file through a process which contains no substantial safeguards to determine reliability (*id.* at 40); and (iv) the Adult Authority members and representatives have no expertise in arriving at fair parole decisions, due to their narrow law-enforcement backgrounds, their rigid and stereotyped thinking patterns, and their punitive anti-prisoner biases (*id.* at 39-40). As a result of these and other defects in Adult Authority procedures, plaintiffs allege, *inter alia,* that the decisions reached and the actions taken by Adult Authority members and representatives are arbitrary and discriminatory and violate plaintiffs' rights to due process and equal protection guaranteed by the Fourteenth Amendment; their right to be free from cruel and unusual punishment, guaranteed by the Eighth Amendment; and their right to be represented by counsel at the time of sentencing, guaranteed by the Sixth Amendment (*id.* at 42-45). They therefore seek declaratory and injunctive relief, asking the District Court to declare the Adult Authority procedures unconstitutional and to issue an injunction which will surround the term-fixing, parole release hearings with basic due process safeguards, including the right to counsel.

3. Proceedings in the District Court and the Court Below.

A. Documents Maintained by the Adult Authority.[9]

In June of 1973 plaintiffs moved for the production of various documents maintained by the Adult Authority (App. 51), including all of those which were at issue in the court below and which are described in the Appendix at page 711 n. 5. Initially, defendants simply refused to file answers or objections until, in response to a motion filed by plaintiffs, the District Court expressly ordered them to do so. Order of the Disrict Court entered on November 15, 1973. Thereafter, defendants filed objections to virtually all of the documents requested (App. 57-75), although no claim of privilege was ever filed by the Chairman of the Adult Authority or the Director of Corrections (App. 718); no designation or description of the documents involved was ever supplied (*id.* at 719); nor was any evidentiary showing ever made with respect to the specific harm which was likely to occur as a result of the inspection.

Plaintiffs' Rule 37 motion to compel production of these documents was initially referred to United States Magistrate David R. Urdan, who conducted a full hearing on the matter before entering his findings and recommendations. Petition for Writs of Certiorari, App. pp. xviii-xxii. Magistrate Urdan recommended, *inter alia,* (1) that defendants produce all of the documents requested, *id.* at xix, and (2) that a

[9]This subsection of respondents' Statement of the Case corresponds to pp. 17-21 of defendants' brief, which also discusses the events in the courts below with respect to these particular documents. The nature and relevancy of the documents themselves are discussed more fully at pages 70-73, *infra.*

protective order be entered, prohibiting plaintiffs' counsel from showing any Adult Authority personnel files to anyone other than personnel employed in their offices, "and then only to the extent necessary to the conduct of the litigation," *id.* at xix-xx.[10] After conducting another hearing on the matter, District Judge Stanley A. Weigel modified and, as modified, adopted the Magistrate's Findings and Recommendations as the order of the court. In doing so he extended the protective order to limit review of the Adult Authority personnel files to "counsel of record for the plaintiffs and no more than a total of two investigators designated by such counsel, and then only to the extent necessary to the conduct of this action." *Id.* at xvi. Judge Weigel also denied defendants' request for an *in camera* inspection of the documents in question.

Defendants then petitioned the court below for a writ of mandamus, which eventuated in that court's order and opinion of January 17, 1975, which is reported at 511 F.2d 192 (9th Cir. 1975) (App. 707-720). In its order, the court below recognized the qualified privilege for official information, but declined "to reach the question of whether this privilege extends to these documents or if a further protective order in the nature of *in camera* inspection is necessary before allowing disclosure." App. at 717. Instead, it held that the privilege itself had not been properly lodged by the head of the department which had control over the documents, after personal con-

[10]Although this protective provision, subsequently adopted as the order of the court, covers only the personnel files, plaintiffs would not object to an order extending it to the other documents here at issue.

sideration by him. Such a claim, the court held, requires the officer to designate which documents are privileged and to "state with specificity the rationale of the claimed privilege." App. 718. Since no such claim had ever been lodged in the District Court—petitioners having filed only a "blanket objection covering any and all documents" (App. 719)—the court denied the petition. It noted, however, that "[s]ince there may be information in the requested documents which should be protected, the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek *in camera* inspection, at the time the documents are discovered in the District Court." App. 719.

B. Inmates' Central Files.[11]

In order to prove, *inter alia,* their allegations that inmate central files are inaccurate and misleading, as well as to locate and prepare inmate witnesses for trial, plaintiffs moved for the production of every twentieth inmate file maintained by the CDC. App. 234-35. When defendants refused to produce the files, plaintiffs moved for an order compelling production which was initially considered by Magistrate Urdan who, after conducting a hearing on the matter, concluded that

> "[f]rom all that appears in the files of this case and from all I have heard at discovery motion

[11]This subsection of plaintiffs' Statement of the Case corresponds to pp. 11-17 of defendants' brief, which discusses the events in the courts below with respect to the inmates' central files. The nature and relevance of these central files are discussed more fully at pages 68-70, *infra*.

> hearings, the conduct of the Adult Authority hearings and the manner in which they are held, together with information in inmate files are, perhaps, the most relevant matters that might tend to support the plaintiffs' claims, are directly relevant and material to the subject of the litigation and are discoverable." Petition for Writs of Certiorari, App., p. xl.

However, his recommendation for production was limited to 200 files, "subject to a protective order that would restrict examination and inspection of inmate files to attorneys for plaintiffs and for their use only in connection with this lawsuit." *Ibid.*

Defendants again sought a review of the magistrate's findings and recommendations in the District Court, whereupon Judge Weigel conducted yet another hearing and—by order dated August 12, 1974—modified and adopted those recommendations. *Id.* at xxix-xxxiii. However, when plaintiffs' counsel attempted to inspect the first set of central files pursuant to the order, counsel for defendants authorized his clients to (1) withhold documents which various prison officials had designated as "confidential" and (2) forbid plaintiffs' counsel to photocopy any of the documents inspected. App. 460-61. Although defendants, at page 13 of their opening brief, state that "[e]ach document withheld was identified in writing, *as was the reason for withholding it*" (emphasis supplied), a mere reading of the cited portion of the Appendix (pp. 502-24) shows that, in most instances, no reason whatsoever was given.

Consequently, plaintiffs were required to return to the District Court with a motion for enforcement, clarification, and sanctions (App. 446-62), which led eventually, after several intermediary proceedings (see defendants' brief at 14-16), to the District Court's order of December 3, 1974 (App. 647-50). That order, which incorporates by reference the court's order of August 12, 1974, also provides, *inter alia,* (1) that the central files shall be produced without any material deleted therefrom; (2) that plaintiffs may photocopy these files; (3) that plaintiffs' attorneys may be assisted, in their inspection, by no more than two persons who shall be attorneys or certified law students and who shall be certified by plaintiffs' attorneys; (4) that no such file shall be inspected or copied unless plaintiffs' counsel shall have obtained, in advance, written consent from the inmate subject of the file; (5) that plaintiffs' attorneys shall not make any use of said photocopies, nor permit inspection thereof, except as necessary for acquittal of their duties of representation in this case"; and (6) that plaintiffs' attorneys are "charged with protecting the confidentiality of the contents of all of the files or portions of the files inspected and/or copies by them and/or their assistants." *Id.* at xxv-xxviii. Defendants thereupon petitioned for a writ of mandamus in the court below, which was denied. App. 699.

SUMMARY OF ARGUMENT

The privilege for official information, which defendants here assert, is both limited and qualified. It is *limited* because many documents which a government agency considers "confidential," such as those which contain factual material or "secret law," do not come within its ambit. And it is *qualified* because documents which do come within its scope—generally intra-agency memoranda of a policy-making nature—must nonetheless be produced pursuant to Rule 34 if the discovering party's need for their use in the litigation outweighs the damage which would be caused by their disclosure. Therefore defendants' insistence that there is a qualified privilege for all "confidential" government documents—which recurs throughout their opening brief—constitutes a serious misstatement of the law.

Under the Federal Rules of Civil Procedure, the burden is on the party asserting a privilege to show that he is entitled to it, and to base that showing "on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." 8 Wright & Miller, *Federal Practice and Procedure* (1970 ed.) § 2035 at 265. However, "[n]either the Chairman of the Authority nor the Director of Corrections nor any official of these agencies asserted, in person or writing, any privilege in the District Court" (App. 718) (opinion of the court below). Nor did defendants or their counsel ever designate "which documents or class of documents are privileged and for what reasons" *(ibid.)* or "state

with specificity the rationale of the claimed privilege" (*id.* at 718). Nor did they even attempt to show what specific harm was *in fact* likely to result from plaintiffs' counsel inspecting the documents in question, subject to the limitations of the protective orders entered by the District Court. Rather, "petitioners' counsel merely raised a blanket objection covering any and all documents * * *" (*id.* at 719), which in their view obligated the District Court either to sustain the privilege or to conduct its own *in camera* inspection of the documents.

However, this Court and the lower federal courts have consistently held that the privilege for official information must be claimed by "the head of the department which has actual control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Such a requirement operates to insure that the claim of privilege is not "lightly invoked", *ibid.*, but rather represents a considered policy decision that production of the documents would be contrary to the public interest. It also enables the court to understand the nature of the potential harm which disclosure could cause and to determine what type of protective order, if any, might mitigate such harm.

In addition, the cases have consistently required a party claiming the privilege to designate the documents involved; to describe why they come within the privilege; to spell out the harm which is likely to occur if they are disclosed; and to support these assertions with an evidentiary showing. Such a showing is necessary in order to determine (1) whether various documents or portions thereof fall entirely outside the privilege (because, e.g., they consist of factual material) or (2) whether the public interest requires that those documents which do come within the privilege ought nonetheless to be disclosed in the litigation. Yet this Court will search the record in vain to find even an attempt by defendants, in the District Court, to make such a showing. Therefore the narrow holding of the court below—that "[t]he governmental privilege must be formally asserted and delineated in order to be raised properly" (App. at 717)—was clearly correct.

Defendants also insist that the District Court had a legal obligation to conduct an *in camera* inspection of the documents before ordering their disclosure. However, any *in camera* inspection seriously undermines the adversary process, gravely prejudices the discovering party, places a great burden on both trial and appellate courts, and is likely to produce an uninformed and therefore erroneous decision. Consequently the lower federal courts are now requiring a party seeking *in camera* inspection to make the type of specific and detailed presentation which will minimize these problems and will also disclose whether or not such an inspection is feasible. Since defendants utterly failed to make such a showing—insisting instead that the District Court was obligated to inspect however many documents are involved—the court below properly declined to decide whether "*in camera* inspection was necessary before allowing disclosure." App. 717. In fact, defendants

are still entitled to "seek *in camera* inspection, at the time the documents are discovered in the District Court." App. at 719.

The opinion of the court below may also be affirmed on the ground that the discovery orders of the District Court were clearly correct. "The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute." *Black v. Sheraton Corporation of America,* 371 F. Supp. 97, 100 (D.D.C. 1974). In this case the documents are highly relevant to the subject matter of the litigation, are reasonably calculated to lead to the discovery of admissible evidence, and would prove useful to such other legitimate purposes as the cross-examination of adverse witnesses. By comparison, the harm which defendants would in fact incur if the documents are inspected pursuant to the protective orders entered by the District Court—and which defendants have never spelled out—is likely to be minimal.

But in addition to a comparison of the competing needs for disclosure and confidentiality, there are strong policy reasons which militate in favor of disclosure in this case. *First*, there is the need to guard against excessive government secrecy, whose object is not to protect the public interest but rather the self-serving interests of the bureaucracy itself. *Second,* disclosure is especially appropriate where, as here, plaintiffs attack not the correctness of an agency decision (e.g., the length of a particular sentence), but

rather the procedures themselves under which criminal sentencing is conducted in California. *Third,* this is not a case in which an individual plaintiff seeks essentially personal gain, but rather a class action brought under the Civil Rights Act where plaintiffs act in the capacity of "private attorneys general" to determine the constitutionality of the procedures followed by the state's parole board. *Fourth,* plaintiffs are here litigating against an agency which has unlimited access to the very documents which it is withholding from plaintiffs, and which it can be expected to use to its considerable advantage at trial. Under these circumstances, the limited discovery ordered by the District Court was manifestly correct, and on this ground alone the decision of the court below could properly be affirmed.

Defendants' Fourth Amendment argument is entirely without merit. That amendment, which was designed to protect individual citizens from government intrusion, has no application to the discovery of documents from the government for use against the government in civil litigation. Nor may the government here assert the Fourth Amendment rights of individuals who have voluntarily furnished information to the government, since they do not have the type of interest, and do not suffer the sort of harm, which the Amendment contemplates. Furthermore, defendants utterly failed to show, in the District Court, who such individuals are; what sort of information has been received from them; what reasonable expectations of privacy, if any, they have; or what harm would come to them from the disclosure ordered

by the court. Finally, the fact that the District Court's discovery orders are correct as a matter of law forecloses any claim that they violate a citizen's right to be free from *unreasonable* searches and seizures.

In the court below defendants were seeking, by way of mandamus, to overturn interlocutory orders of a nonappealable nature. However, defendants failed to show that there had been a "judicial usurpation of power", *Will v. United States,* 389 U.S. 90, 95 (1967); that their right to the issuance of the writ was "clear and indisputable", *id.* at 96; or that they would suffer the type of hardship that justifies resort to mandamus. "Thus the most that can be claimed on the record is that * * * [the District Court] may have erred in matters within his jurisdiction," *id.* at 103-04, and the "extraordinary writs do not reach to such cases * * *." *Ibid.* Plaintiffs therefore ask this Court to affirm the decision of the court below, either for the reasons set forth in its opinion or on the ground that the underlying discovery orders of the District Court are correct and should be complied with by defendants.

ARGUMENT

I

THE COURT BELOW PROPERLY HELD THAT DEFENDANTS FAILED TO MAKE AN ADEQUATE SHOWING THAT THE DOCUMENTS HERE IN QUESTION ARE PROTECTED BY THE QUALIFIED PRIVILEGE FOR OFFICIAL INFORMATION, OR THAT AN IN CAMERA INSPECTION BY THE DISTRICT COURT WAS REQUIRED.

A. THE PRIVILEGE FOR OFFICIAL INFORMATION IS BOTH LIMITED AND QUALIFIED

As the court below correctly held, and as defendants now concede, the only privilege arguably applicable to the documents here in question is the qualified privilege for official information.[12] Throughout their brief, however, defendants make the fundamental error of confusing the concept of "confidentiality" with that of privilege, as if the two are somehow interchangeable.[13]

[12]See App. 717 (opinion below). In the District Court and in the court below, defendants rested their claim of privilege primarily upon (1) California Evidence Code §1040 and California Government Code §6254 (which sets forth the exceptions to the California Public Records Act) and (2) certain exceptions to the Federal Freedom of Information Act (5 U.S.C. §552 *et seq.*). The court below, however, held that these provisions do not create privileges for litigants in federal questions cases (App. 714-17), and defendants do not challenge that holding in this Court. It should also be noted that the holding of the court below, that state privileges do not apply in federal question cases, has been effectively adopted and superceded by Rule 501, Federal Rules of Evidence, which became effective on July 1, 1975. At any rate, defendants now claim only the qualified privilege for official information (see, e.g., Defendants' Brief at 27, 47).

[13]In their Summary of Argument, defendants assert that "the federal courts recognize a qualified privilege to protect confidential documents from unnecessary disclosure" (Defendants' Brief at 27). Thereafter, defendants consistently make reference to, e.g., the "compelled production of confidential documents" (*id.* at 28); "[t]he qualified privilege of non-disclosure of confidential documents" (*id.* at 29); "the compelled disclosure of confidential government documents" (*ibid.*); "documents whose apparent confidentiality clearly outweighed any apparent need of plaintiffs for them" (*id.* at 32); "[t]he confidentiality of portions of the contents of inmate files" (*id.* at 33); and so forth.

Yet the courts have never adopted any "general principle that makes information otherwise discoverable privileged because it was given in confidence." 4 Moore's *Federal Practice* (1974 ed.), ¶26.61 [4.-3] at 26-276. As Judge Prettyman once put it,

> "There is a vast difference between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But privileged means that the contents are of a character that the law as a matter of public policy protects them against disclosure. * * * That the documents are merely confidential does not protect them against compulsory disclosure." *Communist Party of the United States of America v. Subversive Activities Control Board,* 254 F.2d 314, 321 (D.C. Cir. 1958).

In fact, the privilege for official information is, as we shall show, a relatively narrow one which is both limited and qualified. Generally speaking, it applies to intra-agency documents of a confidential nature if, but only if (1) they express opinions or recommendations for use in the decision-making process; (2) their disclosure would harm the consultative functions of government; and (3) the harm resulting from their disclosure outweighs a litigant's need for their production in order to arrive at a just resolution of a legal dispute. See pages 31-33, *infra*. Thus the privilege is *limited* insofar as many intra-agency documents of a confidential nature do not fall within the scope of the privilege at all, and must routinely be disclosed in discovery. And the privilege is *qualified* insofar as

other intra-agency documents which do fall within the scope of the privilege must nonetheless be disclosed in discovery where the litigant's need for them outweighs the damage caused by their disclosure. Since these two concepts are essential to a proper understanding of this case generally—and in particular to an understanding of defendants' failure to make an adequate showing of privilege in the District Court—we shall discuss each briefly in the following pages.

1. The Official Information Privilege Is Limited.

A reading of the federal cases discloses that there are many different types of written material contained in government files, much of it considered to be "confidential", which is not privileged and is routinely available through discovery to a party litigating against an agency. Perhaps the three such categories of material which are most frequently identified are those which contain (1) factual data or investigative reports, (2) advisory opinions which are subsequently adopted as agency policy, and (3) "secret law".

a. Factual Data and Investigative Reports.

This Court has held that intra-agency memoranda "consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government." *EPA v. Mink,* 410 U.S. 73, 87-88 (1973), and cases cited at n. 14. Moreover, the concept of "factual data" generally includes investigative reports, which are also subject to discovery. See, e.g.,

Grumman Aircraft Engineer Corp. v. Renegotiation Board, 425 F.2d 578, 582 (D.C. Cir. 1970); *Boeing Airplane Co. v. Coggeshell,* 280 F.2d 654 (D.C. Cir. 1960). The reason for the rule is that disclosure of such material does not usually impair those "consultative functions of government which the privilege of nondisclosure protects." *EPA v. Mink, supra,* 410 U.S. at 87. In this case many of the documents in question are likely to contain such factual information as the average length of parole hearings; the percentage of paroles granted each month; the average length of time taken to prepare psychiatric or pre-Board reports; the names of inmates who have served more than 20 years without parole; and so forth. Under the law, none of this information—or any other material of a similar nature—would come within the privilege.

b. Memoranda Which Form the Basis for, or Which Explain, an Agency Decision.

Frequently suggestions which are initially contained in decision-making memoranda are subsequently adopted by the agency, either as its official policy or as an explanation of the agency's decision. "In such cases this court has required disclosure of the memoranda, for, once adopted as a rationale for a decision, the memorandum becomes part of the public record." *Montrose Chemical Corporation of California v. Train,* 491 F.2d 63, 70 (D.C. Cir. 1974), and cases cited. Similarly, where an agency, "as a matter of convenience," simply utilized the last five pages of a memorandum as its own findings and determinations, "the memorandum lost its intra-agency status and became a public

record, one which must be disclosed to appellants." *American Mail Line, Ltd. v. Gulick,* 411 F.2d 696, 703 (D.C. Cir. 1969). In the case at bar plaintiffs requested memoranda which pertain to official Policy Statements or Resolutions issued by the Adult Authority; "all documents which concern the Adult Authority's adoption of new policies, procedures, criteria and the like;" and in particular all documents relating to Adult Authority Policy Statement No. 24, which set forth revised policies governing the fixing of terms. See App. 711-12 n. 5. Under the cases cited above, all suggestions contained in those memoranda which have subsequently been adopted as agency policy fall entirely outside the limited privilege and must be disclosed.

c. Documents Which Constitute "Secret Law".

"It is well established that information which either creates or provides a way of determining the extent of substantive rights and liabilities constitutes a form of law that cannot be withheld from the public." *Cuneo v. Schlesinger,* 484 F.2d 1086, 1091 n. 13 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974), and cases cited; see also *General Services Administration v. Benson,* 415 F.2d 878, 881 (9th Cir. 1969); *Ash Grove Cement Company v. FTC,* 371 F. Supp. 370, 374-75 (D.D.C. 1973). Such information, often referred to as "secret law," *Cuneo v. Schlesinger, supra,* 484 F.2d at 1091, consists not only of material which is directive in nature but also that which consists of "interpretations of rules and statutes or guidelines * * *." *Id.* at 1090. As we explain more fully at

pages 61-65, *infra*, it is difficult to imagine an agency whose operations are surrounded by more secrecy than those of the Adult Authority, which applies at closed hearings policy which it has adopted at private meetings. Therefore plaintiffs requested production of all memoranda written by the Chairman of the Adult Authority for the past five years, many of which almost certainly contain directives to be followed by members in conducting term-fixing, parole release hearings.[14] As one court recently observed, in an FOIA case where plaintiffs sought directives by the FTC Commission to its staff, "if any of the documents sought demonstrate the existence of 'secret law', it would appear in the Commission's directives to its staff and/or communications of policy between the Commission and its staff." *Ash Grove Cement Co. v. F.T.C.*, 371 F. Supp. 370, 374-75 (D.D.C. 1973). Therefore, although these documents are considered "confidential" by defendants, all portions thereof which contain such directives simply are not privileged.

Finally, it is clear that material which is not privileged (because, e.g., factual in nature) may not be withheld merely because it is contained in a memorandum which also contains privileged material. *EPA v. Mink, supra.* In such a situation, it is the obligation of the party upon whom the discovery request was

[14]See, e.g., California Adult Authority Chairman's Directive 75/20, dated April 15, 1975, issued by Chairman Procunier, establishing entirely new parole hearing procedures, and Chairman's Directive No. 75/17, dated April 2, 1975, also issued by Chairman Procunier, which establishes an appeals procedure. See also the memorandum dated February 5, 1971, from defendant Kerr, former Adult Authority Chairman, which is reproduced as Appendix C hereto.

served to separate the privileged material and produce it for copying and inspection. *Cuneo v. Schlesinger, supra; Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974). Although the foregoing principles are by now well settled, defendants nowhere acknowledge that there are many "confidential" documents which simply do not come within any privilege whatsoever. Instead, they have consistently assumed that *all* government documents, so long as they are considered "confidential" by the agency, must be considered privileged unless the need for their disclosure outweighs the harm caused thereby. See Note 2, *supra.* Perhaps this failure helps to explain, although it certainly cannot justify, defendants' failure to make the requisite showing of privilege in the District Court.

2. The Official Information Privilege Is Qualified.

In his recent review of executive privilege, Professor Archibald Cox observed that

> "[a]ll the cases that face the question treat the privilege as incomplete. All of the cases hold or assume that the court should decide in each particular case whether the need for the evidence in the administration of justice outweighs the value of confidentiality as an encouragement to candor." Cox, *Executive Privilege,* 122 U. Pa. L. Rev. 1383, 1416 (1974).

See, e.g., *United States v. Nixon,* 418 U.S. 683 (1974); *Nixon v. Sirica,* 487 F.2d 700 (D.C. Cir. 1973); *Carr v. Monroe Manufacturing Co.,* 431 F.2d 384 (5th Cir. 1970), *cert. denied* 400 U.S. 1000 (1970); *Olson Rug*

Company v. NLRB, 291 F.2d 655 (7th Cir. 1961); *Black v. Sheraton Corporation of America*, 371 F. Supp. 97 (D.D.C. 1974); *Amchen Products, Inc. v. GAF Corp.*, 64 F.R.D. 550 (N.D. Ga. 1974); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd* 384 F.2d 979 (D.C. Cir. 1967), *cert. denied* 389 U.S. 952 (1967) [hereinafter referred to as *Carl Zeiss*]. "Each case, we believe, obviously must turn on its own facts; a blanket executive privilege is simply unknown to American law." *In re Midwest Monopolization Litigation*, 60 F.R.D. 12, 17 (W.D. Mo. 1973).

Therefore a determination that an intra-agency memorandum is of an advisory nature marks the beginning, not the end, of a judicial determination with respect to whether it is to be withheld from a discovering party as privileged. Essentially, such a determination

> "requires a delicate balancing of competing interests: the public's interest in preserving confidentiality to promote open communication necessary for an orderly functioning of the government, and the individual's need for disclosure of particular information. The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute." *Black v. Sheraton Corporation of America, supra*, 371 F. Supp. at 100.

This was the holding of the court below (App. 717), and this is the position taken by defendants in their opening brief (see, e.g., pp. 27, 47). Therefore all

parties are in agreement that *if* an intra-agency document is of a policy-making or advisory nature, the trial court must determine "whether the damage resulting from disclosure outweighs the need for the just resolution of a legal dispute." *Black v. Sheraton Corporation of America, supra*, 371 F. Supp. at 100. We turn, therefore, to a discussion of whether defendants made, in the District Court, the sort of showing which is required in order to invoke this privilege.

B. DEFENDANTS MADE NO SHOWING WHATSOEVER IN THE DISTRICT COURT THAT THESE DOCUMENTS ARE PRIVILEGED.

Under the Federal Rules of Civil Procedure, the burden is on the party asserting a privilege to show that he is entitled to it. 8 Wright & Miller, *Federal Practice and Procedure* (1970), §2016 at 126, and cases cited. This is true regardless of whether the privilege is invoked in response to interrogatories served under Rule 33 *(id.*, §2173 at 542-43, and cases cited), a request for production of documents under Rule 34 *(id.*, §§2214 at 644; 4A Moore's *Federal Practice*, ¶34.05 [3] at 34-38), or a subpoena *duces tecum* under Rule 45 (9 Wright & Miller, *supra*, §2457 at 435). Similarly, a resisting party who seeks a protective order under Rule 26(c) must also show "some plainly adequate reason therefor." 8 Wright & Miller, *supra*, §2035 at 264-65.

Traditionally, a *valid* claim of privilege must be asserted by the head of the department involved, after personal consideration by that officer. The claim must

be properly delineated, which "should involve specifying which documents or classes of documents are privileged, and for what reasons * * *." App. 714. And the showing must be factual and evidentiary in nature, rather than a mere conclusory assertion that the privilege obtains. That these requirements are well settled in the law has never been disputed by defendants, either in the court below or in their opening brief in this Court. Yet as we shall now show, defendants never even *attempted* to satisfy any one of these requirements, and on this narrow ground the court below necessarily held that they had failed to properly invoke the privilege.

1. The Legal Requirements.

a. The Privilege for Official Information Must Be Formally Asserted by the Head of the Department.

This Court has said that the privilege for official information belongs to the government and must be asserted by it, adding that

> "[i]t is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds,* 345 U.S. 1, 7-8 (1953).

"While *Reynolds* involved military secrets, subsequent decisions have uniformly applied the guidelines it expressed irrespective of the particular kind of executive claim advanced." *Carl Zeiss, supra,* 40 F.R.D. at 326-27 n. 33, and cases cited. See also, *United States v. Nixon, supra; General Services Administration v. Benson, supra,* 415 F.2d at 879; *Carr v. Monroe Manufacturing Co., supra,* 431 F.2d at 387; *Amchen Products, Inc. v. GAF Corp., supra.* The same rule has been applied where a state agency has asserted the privilege, *Carr v. Monroe Manufacturing Co., supra,* and no reason appears why the result should be otherwise.[15]

We do not, however, rest our position solely on the unbroken line of authority cited above, since there are at least three strong policy reasons why any claim of governmental privilege should be asserted by the agency head, "after actual personal consideration by that officer." *First,* such a requirement would help to insure that the privilege is not "lightly invoked." Such a concern is of considerable importance inasmuch as the effect of the privilege is to deny to a litigant and to the court material which is relevant (and perhaps even crucial) to a fair determination

[15]Defendants cite no authority whatsoever to the contrary, but simply argue that this case is distinguishable from *Reynolds* (no attempt is made to distinguish any of the other cases) because here (i) only a qualified privilege was "ultimately" asserted, (ii) the privilege was asserted by counsel for a *party* to the action, (iii) "the *confidentiality* of the documents was obvious from their description * * * " (emphasis supplied), and (iv) plaintiffs' need for the documents was "dubious on its face" (Defendants' Brief at 43). In the following paragraphs we shall show why, as a matter of policy, the requirement of assertion by the agency head is a salutary one, even where a qualified privilege is asserted by a party to the litigation. Defendants' point (iii) is meaningless, since what is *not* "obvious from their description" is whether the documents are *privileged;* that they may be considered "confidential" by the agency is, as we have shown above, legally irrelevant. And it is simply inaccurate to say that plaintiffs' need for the documents was "dubious on its face", since the United States Magistrate, the District Court, and the court below all held, after conducting hearings on the matter, that they were relevant to the subject matter of the litigation in the District Court. See also pages 61-73, *infra.*

of a lawsuit. Obviously, the more diffuse the authority for invoking the privilege the more likely it is that use of the privilege will unduly proliferate.

Second, the requirement would help to insure that assertion of the privilege represents *considered* agency policy, rather than the *ad hoc* views of assorted middle-echelon functionaries, whose decisions are more likely to represent conflicting, subjective, or perhaps even self-serving interests. In a similar vein, the ABA Special Committee on Federal Practice and Procedure concluded that "if the privilege is to be claimed, it should be done by a high level of authority and not by some Assistant United States Attorney, way down on the bottom of the totem pole." Hearings on Proposed Rules before Special Subcommittee of Federal Criminal Laws, Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. on Proposed Rules of Evidence, Serial No. 2 (Supplement), p. 118 [hereinafter referred to as Hearings on Proposed Rules]. Moreover, the District Court needs to know, not what harm might *conceivably* result from disclosure, but rather the precise nature of the harm to the public interest which the agency head in fact perceives. Such information is crucial, not only because it materially aids the court in striking a fair balance between the competing claims of confidentiality and disclosure, but also because it may enable the trial court to determine whether (and if so, what sort of) a protective order could effectively cure or ameliorate the harm which disclosure might cause.

Third, it is important to acknowledge the divergence of interests, priorities and obligations which exist between an agency's chief, on the one hand, and its attorney, on the other.

> "Given the strong federal preference for complete disclosure, a blanket assertion of the privilege without specificity by the attorneys who are going to try the matter is not adequate. * * * *It is not appropriate for attorneys who are this close to the matter and who, by the nature of the adversary system, have a vested interest in the outcome, to decide whether or not relevant material should be privileged.* For this reason the material which might otherwise be eligible for nondisclosure because of executive privilege must be produced unless the privilege is properly claimed by the appropriate agency head." *Thill Securities Corp. v. New York Stock Exchange,* 57 F.R.D. 133, 138 (E.D. Wisc. 1972) (emphasis supplied).

Thus it has been noted that "the lawyers who litigate the case for the department not infrequently are as set on winning at all costs as counsel for a private litigant." Berger & Krash, *Government Immunity From Discovery,* 59 Yale L. J. 1451, 1464 (1950). It is clear that any adverse effect upon the agency's chances of success in the lawsuit are not to be considered in deciding whether the "public interest" will be injured if the documents are produced. Yet that is likely to be the foremost (and perhaps the only) concern of the agency's attorney, whose position in the litigation may be greatly enhanced—as it has been in this case in the District Court—if the privilege is

upheld.[16] Therefore we submit that this Court should decline defendants' invitation to discard the rule, consistently followed in the federal courts, that the qualified privilege for official information must be invoked by the agency head, "after personal consideration by that officer."

b. Assertion of the Privilege for Official Information Must be Supported by a Description of the Documents and by an Evidentiary Showing That the Privilege Applies.

The court below held that formally claiming a privilege "should involve specifying which documents or class of documents are privileged and for what reasons, especially where the nature of the requested documents does not reveal an obviously privileged matter." App. 719. This modest requirement is plainly a reasonable one, and has been insisted upon by virtually every court which has passed on the matter. Perhaps the best statement of this requirement and its rationale was given by Judge Richey in *Black v. Sheraton Corporation of America, supra,* 371 F. Supp. at 101 (D.D.C. 1974):

[16]Most of the documents here at issue were initially requested, pursuant to Rule 34, F.R.Civ.P., in June of 1973. App. 51-56. However, due to defendants' resistance to producing these documents in the District Court, the court below, and in this Court, together with the stays of the discovery orders issued (and subsequently vacated) by the court below, and by this Court, plaintiffs to this date have never inspected these documents, and it now appears that they will have to go to trial without them. Hence it is plain that, entirely apart from whether or not the "public interest" is served by preserving their confidentiality, defendants and their counsel have greatly enhanced their position in the litigation in the District Court by interposing various claims of privilege which, although they have been consistently rejected, have nonetheless deprived their adversary of many crucial documents which are, at the same time, available to counsel for defendants.

> "A formal and proper claim of executive privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality. (Citations omitted.) Without this specificity, it is impossible for a court to analyze the claim short of disclosure of the very things sought to be protected. (Citation omitted.) As the affidavit now stands, the Court has little more than its *sua sponte* speculation with which to weigh the applicability of the claim. An improperly asserted claim of privilege is no claim of privilege. (Citations omitted.) Therefore, despite the fact that a claim was made by the proper executive as *Reynolds* requires, the Court cannot recognize the claim in the instant case because it is legally insufficient to allow the Court to make a just and reasonable determination as to its applicability. To recognize such a broad claim in which the Defendant has given no precise or compelling reasons to shield these documents from outside scrutiny, would make a farce of the whole procedure."

See also 8 Wright & Miller, *supra,* §2035 at 265; 9 *id.* at 435; *Pacific Architects & Eng., Inc. v. Renegotiation Board,* 505 F. 2d 383 (D.C. Cir. 1974); *Communist Party of the United States of America v. Subversive Activities Control Board, supra,* 254 F. 2d at 321; *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 101 (W.D. Mo. 1973).

But in addition to "a specific designation and description of the documents" and "precise and certain reasons for preserving their confidentiality," *Black v. Sheraton Corporation of America, supra,* the courts

"have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." 8 Wright & Miller, *supra,* §2035 at 265. Thus claims of governmental privilege have been rejected where "[n]o factual allegations as to privilege have been made," *Communist Party of the United States of America v. Subversive Activities Control Board, supra,* 254 F.2d at 321, or where the agency involved "did not present any evidence to the court on this issue," *Gill v. Manual,* 488 F.2d 799, 803 (9th Cir. 1973).[17] Compare *United States v. United Fruit Co.,* 410 F.2d 553, 557 n. 11 (5th Cir. 1969), *cert. denied* 396 U.S. 820 (1969), "where the party seeking the protective order by affidavit presented numerous specific examples of harm which would result if the information sought was disclosed." *Essex Wyre Corp. v. Eastern Elec. Sales Co.,* 48 F.R.D. 308, 311 n. 1 (E.D. Pa. 1969). In any event, the courts have consistently required the showing to "be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of

[17]The type of "detailed justification" which an agency invoking the privilege for official information could and should make is helpfully analyzed in *Pacific Architects & Eng., Inc. v. Renegotiation Board, supra,* 505 F.2d at 385. In that case the court held that the agency's showing should include (i) the extent to which data of the sort in dispute is customarily disclosed to the public; (ii) the extent to which disclosure of the information will impair the government's ability to obtain necessary information of this type in the future; (iii) the extent to which disclosure of the information will cause substantial harm to the person from whom the information is obtained; and (iv) the extent to which any harm of the type so mentioned could be reduced or eliminated by nondisclosure of the identity of the person submitting the information in dispute. In addition, the court made it clear that the resisting party must also submit "specific factual evidentiary material to support the conclusions reached • • •." *Ibid.*

counsel," *Apco Oil Corp. v. Certified Transp., Inc.,* 46 F.R.D. 428, 432 (W.D. Mo. 1969), or "an unsupported claim made only in the brief here that the doctrines of privilege apply," *Communist Party of the United States of America v. Subversive Activities Control Board, supra,* 254 F.2d at 321. *Accord:* 8 Wright & Miller, *supra,* §2035 at 265 n. 23, and accompanying text.

2. Defendants' "Showing" in the District Court.

Defendants, in the District Court, did not even attempt to satisfy a single one of these requirements.[18] No claim of privilege was ever submitted by any official of the Adult Authority or the Department of Corrections; rather, all such claims were made by defendants' counsel or by various, middle-echelon corrections officials at various prisons throughout the state. See note 19, *infra,* and App. 268-72; 499-524. Thus a great many documents were withheld from the central files of two of the named plaintiffs by a "records officer," because they were "classified as confidential within the State Department of Corrections." App. 271-72. And many other documents were removed from inmate central files by various "correctional counselors" and other undesignated officials before they were produced for inspection by plaintiffs' counsel.[19] Thus it is really not apparent, for present purposes, "who the individual exercising that judg-

[18]See generally App. 57-75; 147-196; 220-231; 247-260; 287-293.

[19]See App. 502-524. Each of these pages consists of a form which states that a particular CDC official has "reviewed the file of the above-named person and have authorized the withholding of the listed material from examination by the named person or

ment may have been." *In re Midwest Milk Monopolization Litigation, supra,* 60 F.R.D. at 14.

Nor is there any description of the documents involved, or of the class of documents, or any explanation as to why they are even considered to be "confidential." In fact, the standards which the CDC officials claim to have relied upon in determining whether documents are "confidential" (App. 499-500), which are contained in the Department's inmate records procedures, are so expansive as to bear no resemblance to the narrowly defined privilege for intra-office memoranda recognized by the courts. *Compare* App. 625-29 *with* the discussion at pages 31-33, *supra.* And, to the extent that defendants' counsel made the decisions, it is not unlikely that they were acutely aware of the significant advantage which they would obtain from persistently resisting discovery at all stages of this litigation. See note 16, *supra.*

Thus the fundamental information which a court would need to have is nowhere to be found in this

the person's attorney." Although counsel for defendants has seen fit to utilize the phrase "/s/ [CDC Official]", a review of the original documents would disclose that they are signed by many different officials stationed at various prisons throughout the state, some of whom are correctional counselors ("CCI" or "CCIII"); for others, no title is listed. Although these counselors were at one time required to hold graduate degrees, that is no longer required, and many counselors are ex-guards. "Already, the Department estimates that more than 40 percent of its counselors are not even college graduates • • •. [T]he Department has felt pressure to make promotions available to the large number of correctional officiers with no other place to go." SENATE SELECT COMM. ON PENAL INSTITUTIONS, UPGRADING CORRECTIONAL MANPOWER: A REPORT TO THE CALIFORNIA LEGISLATURE, pt. I, at 20 (April, 1972). Since these officials are neither lawyers nor policy makers, they bring no expertise to bear upon, nor are they even in a position to understand, the issue of whether or not material should be kept from a party litigating against the agency.

record. For example, are intra-office memoranda of an advisory nature involved? If so, were any later relied upon as the rationale for an agency decision? Were any simply adopted and thereafter utilized as the agency's decision? Do any of them explain or interpret official policy? Do any of them contain "secret law"? Was material in certain documents given in exchange for an express promise of confidentiality? Does certain material come from informers whose names must be withheld? Have the documents or any portions thereof previously been made public by the government? Is the allegedly privileged material severable from that which is admittedly non-privileged? This Court will search the entire record in vain for any submission by defendants, in the District Court or in the court below, which even addresses itself in any meaningful way to these or similar questions. Indeed, defendants' statement to the effect that "each document withheld" from certain inmate central files inspected by plaintiffs' counsel "was identified in writing as was the reason for withholding it" (Defendants' Brief at 13), is demonstrably false, as a mere reading of App. 502-24 will quickly show. Instead, there is a continuing series of conclusionary references to these documents as being "confidential," an approach which defendants have continued to utilize in their opening brief in this Court.

Finally, there is no description of the specific harm which would *in fact* be likely to occur if these documents were disclosed *to plaintiffs' counsel pursuant to the protective orders issued by the District Court.*

Rather, defendants have been satisfied to simply recite in their briefs the *general* interests which a state typically has in maintaining the confidentiality of agency documents. See, e.g., App. 173, 277 n. 2, 228; Defendants' Brief at 33-35. However, the protective order issued by the District Court permits inspection of an inmate's central file only after he has given his consent; limits inspection to plaintiffs' counsel and two assistants; and enjoins plaintiffs' counsel to use the material only in connection with the lawsuit and to preserve its confidentiality. It is our submission that unless plaintiffs' counsel were to disobey this order, *no harm whatsoever* would *in fact* result from the disclosure ordered. In any event, it was defendants' obligation to furnish "specific examples of the harm which would result if the information sought was disclosed," *Essex Wyre Corp. v. Eastern Elec. Sales Co., supra,* 48 F.R.D. at 311 n. 1, and this they never even attempted.

Instead, defendants' counsel merely waved a wand over any and all of the (still undesignated) documents which are covered by plaintiffs' request and intoned the magic word: "privileged!" This manifestly inadequate response was correctly rejected by the court below, which held only that if defendants wish to claim the privilege for official information it must be "formally asserted and delineated in order to be raised properly." App. 717. Indeed, the court went on to hold that "[s]ince there may be information in the requested documents which should be protected, the petitioner may assert a privilege to a particular document or a class of documents, and

perhaps seek *in camera* inspection, at the time the documents are discovered in the District Court." *Ibid.* For this Court to overturn that decision would, in effect, grant a license to all agency attorneys to routinely interpose blanket claims of privilege, couched in conclusory terms, covering all of the documents sought by a discovering party, which would then have to be given conclusive effect by the District Court. This, we submit, simply is not and, more importantly, should not be the law.

C. DEFENDANTS' SHOWING IN THE DISTRICT COURT WAS INADEQUATE TO REQUIRE THESE DOCUMENTS TO BE INSPECTED IN CAMERA.

In their opening brief in this Court, defendants have placed primary reliance upon their claim that the District Court was legally *required* to conduct an *in camera* inspection of all documents for which defendants had interposed their conclusory claim of "confidentiality." They argue that this refusal was, without more, a violation of the Federal Rules of Civil Procedure and the Fourth Amendment. Yet once again defendants did not attempt, in the District Court, to make even the minimal showing which would have enabled that court to conduct a fair and meaningful *in camera* inspection or, for that matter, even to determine whether such an inspection was feasible. For this reason alone—as well as for the reasons previously discussed and those set forth in Section II, *infra*—the court below was clearly correct in denying defendants' petition for mandamus, al-

though even in so doing it has left the door open for a subsequent *in camera* inspection should defendants, on remand, invoke the privilege in a proper way.

There are two basic problems necessarily inherent in every *in camera* inspection of allegedly privileged documents. The first is that it all but eliminates the adversary nature of the proceedings, resulting in considerable unfairness to the discovering party. The second is that it places a tremendous burden on the judiciary at both the trial and appellate levels, which those courts are ill equipped to handle. As we shall see, these two concerns are inter-related and effectively reinforce each other in a way which is most advantageous to a government agency resisting discovery, and most unfair to a discovering party seeking production of relevant documents for use in litigation against the agency.

Perhaps the most considered judicial discussion of these two problems is to be found in the seminal case of *Vaughn v. Rosen, supra.*[20] There Judge Wilkey, writing for a unanimous panel,[21] noted that "[i]n a

[20]Although *Vaughn* is a Freedom of Information Act case, the considerations which the court discusses are equally applicable to *in camera* inspections of documents sought by a discovering party under Rule 34, F.R.Civ.P. Most of the FOIA cases cited herein were decided by the D.C. Circuit, "because over half of the FOIA appeals are handled by that court." Note, *Vaughn v. Rosen*: Toward True Freedom of Information, 122 U. Pa. L. Rev. 731, 741 (1974). "The D.C. Circuit had decided 9 of the 17 FOIA appeals through early 1972. See FOIA REPORT, *supra*, Note 1, at 70-71. Subsequent experience reflects, if anything, an increase in this proportion." *Id.* at 741 n. 55.

[21]Another one of the panel members was Judge Robinson, who as a District Court judge was the author of *Carl Zeiss, supra*, a decision which is much relied upon in the area of governmental privilege.

very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information * * *. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure." *Id.* at 823-24.

> "This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure." *Id.* at 824-25.

See also *Cuneo v. Schlesinger, supra,* 484 F.2d at 1091-92; *Nixon v. Sirica, supra.*

In fact, the adverse impact on the adversary process is much greater where, as in the case at bar, it is a party to litigation—rather than a member of the public generally—who seeks an allegedly privileged document from the agency for use in litigation with the agency itself. Under the FOIA, the court

is not to consider the needs of the applicant or the relevance of the document to the subject matter of any pending litigation, nor is it required to balance the need for disclosure against the need for preserving confidentiality. Rather, it must simply determine whether or not the document is of a type enumerated in one of the nine exceptions to the FOIA (see 5 U.S.C. § 552). *Id.* at 823. Thus the essential task of the court is to test the accuracy of the characterization given the allegedly exempt material by the government, although even this task is "compounded by the fact that the entire document is not exempt merely because an isolated portion need not be disclosed," *id.* at 825, and the court must therefore undertake to separate the exempt from the non-exempt.

But where, as here, a private party seeks the production of documents for use in litigation against the agency, the impact of the agency characterization—with consequent unfairness to the discovering party—increases greatly. As the court below pointed out, a document can be relevant under Rule 26 not only if it constitutes evidence for use at trial, but also if it "'appears reasonably calculated to lead to the discovery of admissible evidence'" or if it could be used for the cross-examination of adverse witnesses (App. 714, and cases cited). But the problem is that the District Court simply does not and cannot know, at the discovery stage of litigation, crucial facts which in combination will often determine not only whether a document is relevant but also whether it is privileged since, in cases such as the one at bar, the court

must balance a plaintiff's need for the document against the harm which disclosure would bring. Manifestly the court cannot know, at this stage, such crucial facts as the discovering party's intended trial tactics; the witnesses and other evidence which he intends to use at trial; the contents of depositions already taken; the answers to interrogatories and requests for admission already obtained; the contents of documents previously discovered; the nature of crucial evidence which the party is still attempting to locate; or the adverse witnesses who are likely to be used by either or both parties at trial. As a result, the court usually *cannot* know, regardless of how painstaking and conscientious an *in camera* inspection it conducts, whether a particular document will itself be admissible at trial (because, e.g., it furnishes the foundation for testimony which an expert witness intends to give); whether it will lead to admissible evidence; or whether it will be useful to impeach the testimony of an adverse witness. This Court has itself recognized, in a similar context involving a potential *in camera* inspection of grand jury minutes, that it would be difficult for even the most able trial judge to pick out all of the testimony which would be useful in impeaching a witness at trial.

> "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and

> effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process * * *." *Dennis v. United States,* 384 U.S. 855, 874-75 (1965).

See also, *Natta v. Zletz,* 405 F.2d 99 (7th Cir. 1968), *cert. denied* 395 U.S. 909 (1968), where the Seventh Circuit followed the quoted language in a civil case, recognizing that only the discovering party was in a position to recognize what would be useful to the presentation of its case.

By way of example, one of plaintiffs' counsel had seen, purely by chance during a prison visit, a memorandum written by a high-ranking CDC official which reads in part as follows:

> "Some inmates become tongue-tied or emotionally involved, and during the course of the interview forget what they really wish to discuss with the Board." (App. 78-79; full text of document at App. 421-22.)

This statement is virtually identical to one of the allegations contained in plaintiffs' complaint (App. 41), and therefore it plainly (1) will be admissible at trial; (2) is reasonably calculated to lead to admissible evidence (e.g., through an interview with the author of the memorandum); and (3) is admissible to impeach defendant Kerr, former chairman of the Adult Authority, who had testified in deposition—and will presumably so testify at trial—that inmates *do not* have a hard time articulating their thoughts,

or become unduly tongue-tied at these hearings.[22] Nevertheless, defendants initially objected to producing the document as irrelevant (App. 60), and although a trial judge *might* have picked this one sentence out of the memorandum (the rest of the document is rather innocuous) as relevant to the allegations in the complaint, there was absolutely no way he could have known, without a submission by plaintiffs (who in the ordinary case would not know the contents of the document), what was in the Kerr deposition, and therefore that the document was directly relevant for purposes of cross-examination. See *United States v. Meyer,* 398 F.2d 66, 72 (9th Cir. 1968). Thus even the most rigorous *in camera* inspection still results in a situation involving "half-informed litigants who sometimes get justice, if at all,

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[22]"Q. Isn't it true, Mr. Kerr, that a large number or large percentage of inmates are very scared and nervous at these hearings?
A. I would assume that most of them are under some tension.
Q. Yes. But beyond that, isn't there a large percentage of them that really have a difficult time organizing and articulating their thoughts at the time?
A. No, I wouldn't say so.
Q. Let me ask you this, Mr. Kerr. Do you think this is a fair statement: Some inmates become tongue-tied or emotionally involved and during the course of the interview forget what they really desire to discuss with the Board?
A. I would have no way of knowing.
Q. From five years on conducting interviews you have no feel of whether that statement is probably true or not?
A. It is such a general statement that I would have no way of knowing.
Q. Has it been your experience that some inmates become tongue-tied at these hearings?
A. No.
Q. None?
A. I don't recall a single one that was so tongue-tied he couldn't express himself." App. 94-95.

by accident * * *." *Timken Roller Bearing Co. v. United States,* 38 F.R.D. 57, 63-65 (N.D. Ohio 1964).

Four additional considerations demonstrate that the usual *in camera* procedures cause far more harm to a party litigating against the agency than to the typical plaintiff in a FOIA action. The first is that in litigation the trial court can greatly diminish, and perhaps entirely eliminate, any genuine harm from disclosure by issuing exactly the sort of protective orders which were issued in the District Court in this case; and on this important matter plaintiffs should be able to suggest ways in which this could be done. Secondly, unlike FOIA situations where a single party usually seeks information for personal ends,[23] this case is being maintained as a class action by the named plaintiffs who, under the Civil Rights Act, serve the public interest as "private attorneys general" in challenging the constitutionality of the parole procedures in California. See *Wood v. Brier,* 54 F.R.D. 7, 10-11 (E.D. Wisc. 1972). "Thus, it is of special import that suits brought under this statute be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden." *Id.* at 11.

Third, it is of crucial importance to recognize that counsel for defendants have access to *all* of the disputed documents, as well as the central files of *all*

[23] "Of 40 FOIA cases brought from the effective date of the Act in 1967 through March, 1969, 37 involved actions by corporations or private parties seeking information relating to personal claims or benefits. (Citation omitted.) Of 55 cases over a longer period, only 6 could be termed 'public interest' (citation omitted)." Note, Recent Cases, 87 Harvard L. Rev. 854, 863-64 n. 68 (1974).

inmates in the California prison system, and all other documents maintained by the Adult Authority and the CDC. The unfairness of permitting only one party to a lawsuit to have access to such crucial evidence—a situation which does not exist under the FOIA—needs no elaboration. See generally, 8 Wright & Miller, *supra,* §2019 at 173, and cases cited at n. 30; *Carl Zeiss, supra,* 40 F.R.D. at 329, and cases cited.

Fourth, it is important to note that each *in camera* presentation by an agency resisting discovery gives one party to the litigation an opportunity to present to the court material which may be and often is highly prejudicial to the other party, and which bears not only upon the issue of discovery but upon the substantive issues of the case itself. Thus every *in camera* inspection affords one party, out of the presence of the other, an opportunity to make its case to the judge, thereby further weakening the adversary process and increasing the likelihood that the court will arrive at an erroneous decision.

Accordingly, it is our submission that the *in camera* inspection, which on its face (and in defendants' brief) appears to be such a reasonable and equitable device, is more often just the opposite. By emasculating the adversary process, it enables one party to make a comprehensive and authoritative presentation of its position while at the same time entirely foreclosing the other party from making even an informed guess as to the basic documents around which the dispute centers. Yet it simultaneously imparts a false sense of certainty that documents have been

rejected because they are in fact irrelevant or privileged which is, if anything, more insidious than a candid acknowledgment that the court has given conclusive weight to the government's self-serving characterization of its own documents.

But if such *in camera* procedures are extremely unfair to the discovering party, they are also extremely burdensome to the courts. Although the burden in some cases may be relatively light, in others there may be "hundreds or even thousands of pages" which could take a judge days or weeks to examine. *Vaughn v. Rosen, supra,* 484 F.2d at 825. In addition, an appellate court will often have to conduct yet a second inquiry, one which it is even "less suited to making * * * than is a trial court"; yet "if justice is to be done, the examination must be relatively comprehensive." *Id.* at 825. And "to the extent that the number of facts in dispute are increased, the efficiency of the court system involved in that dispute resolution will be decreased." *Id.* at 826.

As a result, for a court to sustain the tactic employed by defendants in the District Court—i.e., the submission of a blanket claim of privilege combined with a demand for *in camera* inspection, based upon nothing more than a conclusory claim of "confidentiality"—actually "*encourages* the Government to contend that large masses of information are exempt [or, as here, privileged], when in fact part of the information should be disclosed." *Id.* at 826. This is true because, first, there is no incentive for the agency to disclose: "[a]t most they will be put to a court test stacked in

their favor, the burden of which can be easily shifted to another by simply averring that the information * * * [is privileged]." *Id.* at 826. And secondly, once "the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore the discloseable sections, and persuade the court that the entire mass is exempt." *Ibid.*

In the District Court, defendants entirely failed to accompany their demand for *in camera* inspection with any sort of analysis which would have aided the District Court in (1) deciding whether such an inspection was feasible or (2) conducting such an inspection in an informed and efficient manner. As noted earlier, the privilege itself was never invoked by any agency head, after personal examination, but rather by an Assistant Attorney General and by various middle-echelon CDC staff members, partly on the basis of criteria quite different from those which constitute the qualified privilege for official information. No designation or description of the documents for which the privilege is claimed was ever attempted, and to this day no one even knows how many documents are involved. Nor, of course, was there any attempt at separating privileged from non-privileged matter, or any indexing of the documents in order to relate the allegedly privileged material to the privilege itself. Nor was any attempt made to specify the precise harm which might occur from disclosure under the terms of the protective order. Accordingly, it was entirely proper for the District Court to deny defend-

ants' demand for *in camera* inspection, and it is significant that defendants do not cite a single case in support of their argument to the contrary.

Even so, the court below expressly left open the possibility that defendants may still "seek *in camera* inspection, at the time the documents are discovered in the disrict court." App. at 719. That being so, and because this Court has not heretofore considered this issue in any detail,[24] we shall now submit our recommendations for the type of showing which should be required of a party which requests a district court to conduct an *in camera* inspection of allegedly privileged documents.

First, the privilege should be formally asserted by the head of the agency involved, after personal consideration by that officer, as held by the court below. See pages 34-38, *supra.*

Second, as the court below also held, the claim of privilege should involve a description of the specific documents involved, and a division of the documents into privileged and non-privileged segments. *Vaughn v. Rosen, supra; Nixon v. Sirica, supra.*

Third, there should be a detailed statement of the reasons why the allegedly privileged segments come within the qualified privilege for official

[24] See *EPA v. Mink, supra,* where the Court referred to the submission, by an agency, of "detailed affidavits or oral testimony" to support a claimed exemption under the FOIA. The court's discussion in *Vaughn* was intended to elaborate upon the suggestions contained in the *Mink* opinion. 484 F.2d at 824.

information, together with an evidentiary showing that this is so. *Vaughn v. Rosen, supra; Cuneo v. Schlesinger, supra; Pacific Architects & Eng., Inc. v. Renegotiation Board, supra.*

Fourth, there should be a detailed statement of the specific harm which, in the opinion of the agency head, would *in fact* be caused if the allegedly privileged segments were produced, together with an evidentiary hearing showing that this is so. *Vaughn v. Rosen, supra; Pacific Architects & Eng., Inc. v. Renegotiation Board, supra.*

Fifth, the agency should submit an index which will subdivide each allegedly privileged document into manageable portions, cross-referenced to the relevant part of the Government's justification. *Vaughn v. Rosen, supra; Cuneo v. Schlesinger, supra; Nixon v. Sirica, supra.*

All of these procedures must now be routinely followed, at least in the D.C. Circuit, for cases arising under the FOIA where an agency seeks to avoid disclosure under one of the Act's exemptions.

It is our position, however, for reasons set forth at pages 47-54, *supra,* that such requirements should be far more rigorous in cases involving the production of documents under Rule 34, F. R. Civ. P., for purposes of litigation against the withholding agency, than those required of an agency claiming an exemption under the FOIA. Therefore we suggest that in such cases at least one counsel for the discovering party be permitted to view, in chambers, the material

which the resisting agency claims to be irrelevant or privileged. Such counsel, who should not at this stage have the right to photocopy the material, would be allowed to make his inspection for the sole purpose of permitting him to show the District Court why the material is in fact relevant and not privileged, and could be ordered not to disclose or otherwise use the material for any other purpose. Such a showing could be made, for example, by reference to other evidence to be adduced at trial; by the utility which the material has for the cross-examination and impeachment of adverse witnesses; or by reference to the discovering party's theory of the case. So far as privilege is concerned, counsel could point out (1) that the allegedly privileged material is in fact comprised, at least in part, of factual material, investigatory reports, intra-agency material which was subsequently adopted as agency policy, or documents which constitute "secret law", and which is severable from the admittedly privileged material; (2) that even as to material which falls within the qualified privilege, his clients' need for the material in the litigation outweighs the likely harm of disclosure; and (3) that any harm to the public interest which might arise from disclosure could be eliminated or significantly reduced by the entry of a particular protective order. Such a showing could be made at a hearing, to be held in chambers, at which both sides would be able to make an informed presentation, following which the court could itself make an informed decision without the expenditure of an undue amount of judicial time.

Adoption of a procedure such as that described in the preceding paragraph would, of course, undermine to some extent the value of the privilege. However this is precisely the procedure contemplated by the court in *Nixon v. Sirica, supra,* in which it was suggested that the Special Prosecutor might be afforded "access to the material for the limited purpose of aiding the Court in determining the relevance of the material to the grand jury's investigations." 487 F.2d at 721. Moreover, if the inspection is limited to one counsel who is sworn to secrecy by order of the court, the harm *in fact* caused by the disclosure is quite likely to be far less than that caused by the alternative of keeping the discovering party in ignorance of the contents of the documents (as to which opposing counsel have unlimited access), and requiring the trial court to make its own time-consuming inspection "without benefit of criticism and illumination by a party with the actual interest in forcing disclosure." *Vaughn v. Rosen, supra,* 484 F.2d at 825. Stated differently, no one claims that the government "should be required to 'operate in a fishbowl', but by the same token we do not feel that * * * [the discovering party] should be required to operate in a darkroom." *American Mail Line Ltd. v. Gulick, supra,* 411 F.2d at 703.

In any event, it is clear that defendants entirely failed to make the sort of showing which would have enabled the District Court to determine whether or not an *in camera* inspection was necessary or feasible, or to conduct such an inspection in a meaningful way.

Yet even so the court below has not foreclosed defendants from making such a showing upon the remand of this case. Therefore if this Court reaches the issue, we submit that it should require any party seeking an *in camera* inspection pursuant to Rule 34 to make the type of showing outlined above, and should require the District Court to give counsel for the discovering party a limited opportunity to view the material in order to protect his client's rights and to assist the court in arriving at an informed decision.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DISCOVERY BECAUSE PLAINTIFFS' NEED TO INSPECT THESE DOCUMENTS IN THIS CASE CLEARLY OUTWEIGHS ANY HARM WHICH DEFENDANTS ARE IN FACT LIKELY TO INCUR.

In the preceding section of this brief, plaintiffs have defended the rather modest holding of the court below, to the effect that defendants did not properly assert or delineate the qualified privilege which they sought to invoke. Yet the underlying discovery orders issued by the District Court may also be upheld on the ground that plaintiffs' need for the documents in question clearly outweighs any real harm that defendants are likely to incur, especially in view of the carefully drawn protective orders under which they are to be produced. Although this question was not reached by the court below (App. 717), it was fully briefed in that court and in the District Court, and would

therefore properly form the basis of a decision by this Court affirming the decision of the court below. *Jaffke v. Dunham,* 352 U.S. 280 (1957); *Dessar v. Bank of America,* 353 F.2d 468 (9th Cir. 1965).

"The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute." *Black v. Sheraton Corporation of America, supra,* 371 F. Supp. at 100. We shall, therefore, discuss first plaintiffs' need for these documents; next, the harm that defendants might incur if they were to be produced; and finally, the several policy reasons why, in the special circumstances of this case, production is clearly warranted.

We have already outlined the dual role of the Adult Authority in (1) adopting and changing fundamental sentencing policies and goals, as well as criteria and procedures to be applied in fixing terms and granting paroles, and (2) conducting the term-fixing, parole determination hearings. These two activities, although separate, are intimately related, and an understanding of this interrelationship is crucial to a proper resolution of this case. For although defendants, in their brief, focus almost entirely upon the hearings, it is our submission that some of the most egregious and unlawful aspects of the system relate to the making of what is in effect "secret law." Thus we find that in 1971 a decision is made, in secret, to "get tough" and sharply decrease the number of paroles granted. See Appendix A. In 1975, however, with the advent of a new Administration in Sacramento and a newly ap-

pointed Chairman of the Adult Authority, another decision is made, again in secret, to "loosen up" and sharply increase the number of paroles granted. See Appendix B. And so the percentage of parole dates given out fluctuates wildly from one year to the next, based upon secret decisions which, in plaintiffs' view, are at best arbitrary and at worst the result of legally impermissible influences.[25]

Certainly it is not difficult to identify many legally impermissible factors which the documents here in issue may disclose. For example, what if the documents were to show that secret decisions have been reached, pursuant to which (1) Adult Authority members automatically ratify all recommendations by hearing representatives; (2) each member has been assigned a quota of paroles to be granted at each prison; (3) conclusive weight is to be given to the parole recommendations of each inmate's prison counselor; (4) all inmates suspected of belonging to the Black Muslim sect are to be denied parole; (5) no inmate is to be paroled until he admits guilt; (6) additional time is to be required of each inmate who did not plead guilty; or (7) extra time is to be given for crimes of which the inmate had been acquitted at trial, or which had been dismissed as the result of a plea bargain? What if, as we think likely, the documents show that many fundamental policy decisions emanate from the office of the state governor or other political leaders, and are made for such reasons as cutting costs (by lowering the prison population), or striking a "law and order" image (by raising it)? *Cf.* Appendices A and B. Such examples could, of course, easily be multiplied, but the point should already be clear: that if illegal policies, secretly adopted, determine the actions of the Adult Authority officials at the term-fixing hearings, plaintiffs cannot adequately prove the invalidity of the system without proving what these policies are, and how they affect individual term-fixing decisions.

As a California Assembly Report on the Adult Authority once observed, "[t]he parole board is one of the last bastions of unchecked and arbitrary power in America." California Assembly, Select Committee on the Administration of Justice, Parole Board Re-

[25] Although judicial review of sentences imposed by federal courts is limited, appellate courts have long recognized "the implicit distinction between review of the merits of a sentence and review of the procedure leading to the sentence." Note, Appellate Review of Sentencing Procedure, 74 Yale L. J. 379, 382 (1964). Thus federal courts have vacated sentences where a judge has "given substantial consideration to legally impermissible factors." *Marano v. United States*, 374 F.2d 583, 586 (1st Cir. 1967). See *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *North Carolina v. Pearce*, 395 U.S. 711, 726 (1968); *Scott v. United States*, 419 F.2d 264, 266 (D.C. Cir. 1969); *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). Among such legally impermissible factors are the refusal of a defendant to admit guilt at the time of sentencing, *Scott v. United States, supra; Thomas v. United States, supra;* the refusal of a defendant to plead guilty rather than to insist upon standing trial, *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960); the use of illegally obtained evidence, *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968), *cert. denied* 397 U.S. 925 (1969); the belief by the sentencing judge that defendant had committed an additional crime for which he had not been tried, *Scott v. United States, supra;* and the use of facts erroneously considered by the sentencing judge to be "aggravating circumstances," *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967), *rev'd. on other grounds*, 391 U.S. 367 (1968).

form in California: Order Out Of Chaos 115 (1970). In this regard, the difference between the clearly delineated and severely limited power given to members of the judiciary, on the one hand, and the virtually unlimited discretion given to members of the Adult Authority, on the other, is instructive. Judges, who all have considerable legal training, are bound by strict rules of procedure and evidence, not of their own making; mediate between opposing parties represented by competent counsel; function in open court, with all exchanges on the record; are limited to imposing (in criminal cases) a prison sentence "prescribed by law;" and are subject to judicial review of all significant actions. Similarly, most administrative agencies which hold adjudicative hearings are bound by rules which must be adopted and promulgated under some type of Administrative Procedure Act; permit interested parties to be heard through counsel and to obtain a full record of the proceedings; and are subject to effective judicial review. By contrast, Adult Authority members and hearing representatives, most of whom have no legal training whatsoever (but instead are ex-law enforcement or ex-correctional officers), make up their own rules, and in doing so are not even subject to the California Administrative Procedure Act;[26] do not permit counsel to appear at the hearings which they conduct; have the power to make many inmates serve an entire lifetime in prison; make no transcript of their proceedings, which are for the most part held entirely in secret; and are subject to

[26]See note 7, *supra*.

no effective judicial review.[27] These powers, unknown to any other area of the law, have been termed by one commentator as "the most important anomaly in California criminal procedure." Johnson, "Multiple Punishment and Consecutive Sentences: Reflections on the *Neal* Doctrine," 58 Cal. L. Rev. 357, 390 (1970).

Thus plaintiffs' need for the documents here at issue —in order to prove, at trial, that the Adult Authority procedures in question are unconstitutional—must be viewed in light of the fact that (1) the Adult Authority is vested with virtually unlimited and unprecedented discretion in performing what is clearly the sentencing function of the criminal process; (2) the Adult Authority, unlike almost every other comparable agency, operates entirely in secret (whether it is adopting its policies in secret meetings or applying

[27]It is occasionally said, usually in a court decision denying due process rights, that any individual case involving an illegal parole determination may be challenged by habeas corpus in a state court. See, e.g., *Dorado v. Kerr*, 454 F.2d 892, 898 (9th Cir. 1972), *cert. denied* 409 U.S. 846 (1972). And in fact habeas corpus does lie in California to challenge such a determination. See, e.g., *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384 (1975). Yet *in fact* such decisions are almost entirely limited to a few cases in which an appellate court wishes to announce or modify fundamental principles of law, as in *Rodriguez*. Indeed, as of 1972, one commentator found that "*no court* has found the authorities' cause so meager as to warrant upsetting a denial of parole." Parsons-Lewis, Due Process in Parole-Release Decisions, 60 California L. Rev. 1518, 1525 n. 44 (1972) (emphasis supplied). See also *In re Rodriguez*, *supra*, 14 Cal. 3d at 650 n. 15. This is understandable for many reasons, not the least of which is the fact that no record is made at the Adult Authority hearings which a court could review. Beyond that, "[t]he discretion lodged in the authority is so broad that it is seldom that case can be made out that would show an abuse of that discretion." *Azeria v. California Adult Authority*, 193 Cal. App. 2d 1, 5, 13 Cal. Rptr. 839, 842 (1961). Therefore as a practical matter it is quite accurate to say that the more than 20,000 individual decisions made annually by the Adult Authority are in fact subject to no judicial review.

them in secret hearings); and (3) renders decisions which require California prisoners to serve literally thousands of years in prison, yet which are subject to no effective judicial review. Moreover, plaintiffs' proof, as may readily be seen from the complaint (App. 39-45), must be highly specific in nature, since plaintiffs must *prove* that Adult Authority members in fact have no expertise; that in fact policy decisions are adopted and prison terms are imposed for legally impermissible reasons; that Board members in fact rely upon material in the central files which is meaningless or inaccurate; that they have an inadequate amount of time to conduct the hearings, which are themselves ineffective to develop the basis upon which a rational parole decision can be made; and that these infirmities, in combination, constitute a constitutionally impermissible system of sentencing.[28] Thus it is against this burden of proof that we examine

[28]Plaintiffs have deliberately chosen to undertake such an extensive factual showing because previous attacks on parole boards, raising pure issues of law and producing paper records, have generally been unsuccessful. See, e.g., *Dorado v. Kerr, supra.* It is plaintiffs' view that such lawsuits do not succeed because they (1) require courts to make crucial assumptions about the facts here in issue which are, for the most part, inaccurate (e.g., that parole boards possess expertise which enables them to "determine whether a particular prisoner is ready to return to society," *id.*, 454 F.2d at 897, or that present proceedings are "flexible," *id.* at 898), and/or (2) encourage courts to determine the basic issue by the use of labels and fictions (e.g., right/privilege, "vested rights," and so forth, *id.* at 897). Plaintiffs therefore believe that only by demonstrating, through an extensive evidentiary showing at trial, that the whole process is *in fact* infected throughout with unwarranted assumptions, unreliable documents, and illegal practices, will they be able to convince both the District Court and the appellate courts that their legal claims are valid and that the relief which they seek is justified.

plaintiffs' need for production of the particular documents here in question.

A. Personnel Files of Adult Authority Members.

The virtually unlimited discretion of the Adult Authority is often defended on the grounds that parole board members possess unusual "expertise" in making the type of parole decisions which plaintiffs challenge in the underlying case in the District Court.[29] In addition, courts may assume that, in accordance with California Penal Code §5075 (West 1970), "members shall be selected who have a varied and sympathetic interest in corrections work including persons widely experienced in the fields of corrections, sociology, law, law enforcement, and education." Therefore it is a manifestly crucial part of plaintiffs' case to show that *in fact* members and representatives have no such "expertise" or experience, but to the contrary are indeed—as the complaint alleges—extremely

[29]"[T]he whole concept for the indeterminate sentence rested on the assumption that persons sentenced to prison would be examined by a board of 'experts' who would have the skills as well as the total discretion to decide when, if ever, to release prisoners from one day to life sentences they were serving . . . today the completely indeterminate sentence idea is rarely in use and has few supporters among professionals in correctional administration. In part, I suppose, this is because there are in fact no 'experts' really skillful or confident enough to claim or exercise such limitless discretion." Johnson, "The Responsibility of a Parole Board to Change its Own Role", *Corrections in Context: The Criminal Justice System and the Corrective Function*, ed. Doris Grotewohl Baker, University of Wisconsin Extension Center for Continuing Education and Community Action for Social Service, 1972. In addition, in their answer to the complaint defendants "assert that Adult Authority members and representatives have expertise and a great deal of experience with respect to the tasks performed by them to which the complaint makes reference • • •." App. 360.

unsuited to their task. These allegations have been expressly denied by petitioners in their answer (App. 360), and are properly at issue in the District Court. In addition, plaintiffs intend to call most if not all members of the Adult Authority as adverse witnesses at trial. Therefore whatever else may be said about the personal files of the members and hearing representatives, it cannot be said that they are irrelevant to the subject matter of the litigation (Rule 26, F. R. Civ. P.); *or* that they are not reasonably calculated to lead to admissible evidence (*ibid.*); *or* that they would not be "particularly important to preparation for effective cross-examination of * * * [adverse] witnesses." *United States v. Meyer,* 398 F. 2d 66, 72 (9th Cir. 1968).

B. Inmates' Central Files.

The only documents which Adult Authority members consult in determining whether or not to fix an inmate's term are contained in the inmate's "central file". Specific documents typically relied upon include pre-Board reports prepared especially for the hearings; psychiatric evaluations; disciplinary reports; a "cumulative summary", containing information about the inmate's background and commitment offense; reports concerning previous board appearances, including reasons for denying parole; and CDC Form 128, upon which prison staff members can make notations about any aspect of the inmate's behavior. Plaintiffs have alleged in the complaint that this material, upon which Adult Authority members heavily depend, is unreliable

> "because it is composed of reports which (i) are often false, malicious, inaccurate, or misleading; (ii) are essentially one-sided, insofar as they contain almost exclusively adverse material, without a corresponding emphasis upon the positive aspects of an inmate's prison behavior; (iii) are placed in an inmate's file through a process which contains no substantial safeguards whatsoever to determine reliability; and (iv) may not be reviewed by the inmate, who is therefore unable to refute even the most demonstrably untrue information." App. 40-41.

In order to prove this allegation—which is plainly crucial to their case—plaintiffs need to inspect many such files, and then to introduce at trial documents which they can show to be false or misleading.[30] Similarly, plaintiffs need to show that many psychiatric reports which are contained in the central files, and often given conclusive weight in denying an inmate parole, are incorrect, misleading, ambiguous, or "questionable at best," *In re Rodriguez, supra,* 14 Cal. 3d at 651 n. 16. In addition, review of the entire central files of the named plaintiffs is essential in order to prove the allegations in the complaint concerning their treatment by the Adult Authority. App. 18-39. Such review is also necessary with respect to those inmates

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[30]For example, in *In re Rodriguez, supra,* the court commented upon an adverse document in petitioner's central file which was, at the hearing in that case, conceded to be false by the Adult Authority's attorney. See *In re Rodriguez, supra,* 14 Cal. 3d at 648 n. 14. The court also noted several other major inaccuracies and contradictions in the file, including a report that the petitioner's "family rejects him," when in fact "the family had available not only a home for petitioner but also employment in the family business." *Id.* at 651 n. 16.

whom plaintiffs intend to call as witnesses at trial, as well as those inmates, if any, whose testimony defendants plan to use.

Moreover, plaintiffs' otherwise compelling need to inspect these central files is made all the more urgent by the fact that defendants' attorneys have unlimited access to all of these files and will doubtless utilize whatever documents prove useful to impeach the plaintiffs and their witnesses, and to disprove the allegations contained in the complaint.[31] For this reason, every such file is a potential time bomb for plaintiffs at trial, since defendants' counsel can pick and choose from among all of the documents which it contains for purposes of impeachment. Thus the United States Magistrate who initially heard the discovery motions in this case was clearly correct when he concluded that these central files, together with the hearings themselves, are "the most relevant matters that might tend to support the plaintiffs' claims * * *." App. to Defendants' Petition for Writs of Certiorari, p. xl.

C. Adult Authority Documents.

Apart from the Adult Authority personnel files, discussed above, plaintiffs requested that defendants produce six other types of documents. App. 711-12 n. 5. Initially, we note that many of them almost surely consist of, or at least include, written material which

[31]See, e.g., *In re Hutchinson*, 23 Cal. App. 3d 337, 340, 100 Cal. Rptr. 124, 126 (1972), in which the respondent prison superintendent, represented by the Attorney General, filed a "plethora" of records from the prisoner-petitioners' central files in support of his return to the court's order to show cause, while at the same time refusing to make those files available to petitioners' counsel.

falls well outside the governmental privilege, insofar as they are memoranda which make suggestions subsequently adopted as the official policy of the Adult Authority (e.g., *id.*, items number 14, 18, 21, 22); which explain and elaborate upon official regulations (*id.*, items number 21 and 22); or which consist of the type of directive to members and hearing representagency (*id.*, item number 20).[31a] Moreover, it is quite likely that item number 15, calling for statements relating to pending legislation, also falls outside the ambit of the governmental privilege. And many documents described by the request doubtless contain the type of factual material (e.g., percentage of hearings in which paroles were granted, average length of

[31a]For a good example of how "secret law" is promulgated directly by the Chairman of the Adult Authority, see the memorandum issued by defendant Kerr which is Exhibit D to the deposition of Mr. Kerr dated January 22, 1973, and is reproduced as Appendix C hereto. That memorandum informs all Adult Authority members and hearing representatives that the staff of the Attorney General sees "no major problem" if a correctional counselor writes a psychiatric report for the Adult Authority, provided a qualified psychiatrist or psychologist reviews and approves it. Although Mr. Kerr somewhat curiously stated that neither he nor the board had ever "taken a position" on this matter (deposition of January 22, 1973, at 74-75), the import of the memorandum is obvious, especially since such reports are in fact written by counselors (*id.* at 75-77). Mr. Kerr said that he did not know whether or not this recommendation was secret or public (*id.* at 72).

Adult Authority hearings) or investigative reports which also are not covered by the privilege. All such material, of course, must be produced for plaintiffs without any consideration given to whether or not it is considered "confidential" by defendants or whether plaintiffs' need for it outweighs the harm which its disclosure might cause. See pages 27-31, *supra.*

We come, then, to a consideration of documents which, *arguendo,* fall within the ambit of the qualified privilege, i.e., intra-agency memoranda of an advisory or decision-making nature. Such memoranda are most likely to articulate, *inter alia,* defects in (i) the present system of adopting policies and regulations; (ii) the standards or procedures utilized in fixing terms and granting paroles; (iii) the materials relied upon in the term-fixing hearings; (iv) the conduct of the hearings themselves; or (v) results reached by the Authority which are perceived to be incorrect or inequitable. Certainly no elaboration is needed on the utility of such admissions from these defendants concerning the very defects alleged in the complaint. Thus, plaintiffs may be hard pressed to demonstrate to the District Court that the hearings are too short, or that the psychological evaluations are not understood by Adult Authority members, or that the Adult Authority members have difficulty in communicating with members of minority groups. But if official documents of the agency were to acknowledge that any or all of these statements are in fact true, the effect upon the outcome of the trial could be considerable. Doubtless it is this very concern which has prompted defendants to resist with such tenacity, at every stage

of the discovery process, the production of the documents which are at issue in this case.[32]

More could, of course, be said concerning the utility of these documents to the plaintiffs at the trial of this matter in the District Court. However, it is necessary to consider also the harm which would result from disclosure of these documents in accordance with the District Court's orders. As noted earlier, the court issued strong protective orders which cover most of the documents at issue, and in fact plaintiffs would not oppose extension of those orders to cover all documents produced during the course of this litigation. Under the terms of those orders, (1) most of the documents are to be viewed only by counsel for plaintiffs and their assistants (and this only to the

[32]Throughout their opening brief, defendants refer to the other discovery which plaintiffs "have demanded and have been furnished • • • in massive proportions" (Defendants' Brief at 21-24), and which in their view significantly reduces plaintiffs' need for the documents here at issue. However, the amount of discovery which plaintiffs have *demanded* has been relatively minimal when measured against the standards of major test case, class action litigation. The discovery which plaintiffs have been *furnished* is much less than that, due to defendants' refusal to answer or otherwise comply with much requested discovery. (For example, defendants have refused to supply answers to many interrogatories, including those which sought to determine which witnesses defendants may call and what documents they may introduce at trial, and this at a time when the trial date was but a few months away. See, e.g., answers of defendant Charles Brown to Plaintiffs' Interrogatories No. 60-78, filed March 13, 1975. But more importantly, there really is no satisfactory way to prove, for example, how the Adult Authority operates, in secret, to make policy or even to prove what that secret policy is; to prove that the inmate central files contain false and misleading material to a significant degree; or to show that the Adult Authority members in fact do not possess the supposed expertise, other than to make that proof from defendants' own files. Therefore even that discovery which defendants have reluctantly furnished cannot perform the crucial function of proving out the "secret law" of this agency which is, to a large extent, at the heart of this case.

extent necessary to the conduct of the litigation); (2) no inmate's central file may be inspected unless he has consented thereto; and (3) plaintiffs' counsel are charged with protecting the confidentiality of all central files inspected by them or by their assistants.[33]

Therefore the question is not the general one posed in FOIA cases—where official documents are simply turned over to members of the public, with no strings attached—as to whether *some* sort of harm *might* result from the uncontrolled availability of a confidential document. In such cases, where a document could be obtained by or turned over to political "enemies" or might even be published and thereby disseminated to the world at large, there may well be considerable wisdom in the rule protecting those intra-agency memoranda which comprise part of the consultative functions of government. But here the question of harm is a much narrower one, to wit: what harm is in fact likely if plaintiffs' attorneys, officers of the court, and a few assistants obtain these documents for use solely in this litigation, having been ordered by the District Court not to disclose their contents to any other person under pain of contempt? It is our sub-

[33]Defendants' analysis of the effect of the protective order in determining the validity *vel non* of the discovery orders, at page 45 of Defendants' Brief, is faulty. There they argue that "a protective order is no substitute for the privilege," since "if defendants' assertions of confidentiality are well taken, the documents are privileged from any disclosure." However, the determination which the court must reach is whether or not the harm from disclosure outweighs plaintiffs' need for the documents, and to the extent that a protective order diminishes or even eliminates any such harm, it must naturally be considered in determining whether the *qualified* governmental privilege applies to these documents. See pages 31-33, *supra*.

mission that, unless plaintiffs' counsel would disobey the protective order (which defendants have never suggested), virtually *no* harm will *in fact* be incurred by defendants. Certainly defendants have never once attempted to show or even to describe, in any court, the specific harm which they believe outweighs the need for plaintiffs to utilize this information at trial.[34]

In our view, plaintiffs' substantial need for these documents clearly outweighs the speculative and probably illusory harm which might occur if the discovery orders are obeyed especially where, as here, disclosure is severely limited in accordance with protective orders. This fact alone, under the cases, would have justified the District Court in ordering the documents disclosed in their entirety. Yet there are at least four other weighty reasons why, in the circumstances of this case, disclosure was fully justified.

First, there is the real and significant danger of excessive government secrecy, the main purpose of which is not to protect the public interest but rather the self-serving interests of the bureaucracy itself. See generally Berger & Krash, *Government Immunity from Discovery,* 59 Yale L. J. 1451 (1950); *Timken Roller Bearing Company v. United States, supra,* 38 F.R.D. at 68-69, and authorities cited. As a result of

[34]Generally, defendants are satisfied to summarize a "state's interest" in preserving the confidentiality of its documents. See, e.g., App. 173-74, 227 n. 2. Although certain of these interests (e.g., protecting informants and encouraging candor) are certainly worth preserving as a general proposition, defendants nowhere specify how they would *in fact* be jeopardized if the documents here at issue are viewed by plaintiffs' counsel in strict accordance with the restrictions imposed by the protective orders.

this concern, Congress reacted more strongly against proposed Rule 509 of the proposed Rules of Evidence —which would have contained a qualified privilege for official information—than against any other provision in the proposed rules. See generally 2 Weinstein's *Evidence* (1975) at 509-3; Berger, *How the Privilege for Government Information Met Its Watergate,* 25 Case Wes. Res. L. Rev. 747 (1975). "The outcry over this rule in Congress and the press, stimulated in large measure by the Watergate affair, may in itself have been sufficient to delay adoption of the rules and to cause deletion of Article V." 2 Weinstein's *Evidence, supra,* at 501-17. Therefore at a time when there is a broad movement toward more openness and less secrecy in governmental decision-making, restricted discovery orders such as those issued by the District Court serve a salutary purpose in countering "the potential for misuse of governmental privilege," *Carr v. Monroe Manufacturing Co., supra,* 431 F.2d at 388.

Second, it should be noted that a basis sometimes invoked for preserving the confidentiality of intra-office memoranda is the rule against "probing the mental processes" of an executive officer, a rule which is frequently said to foreclose investigation into the methods by which an administrative decision is reached. See generally *Carl Zeiss, supra,* 40 F.R.D. at 325 n. 24-30, and accompanying text. This rule is typically applied in cases where a litigant, in his effort to overturn a particular administrative decision, seeks to discredit the methods or mental processes of the decision-maker. See, e.g., *Machin v. Zuckert,* 316 F.2d

336 (D.C. Cir. 1963), *cert. denied* 375 U.S. 896 (1963); *Boeing Airplane Co. v. Coggeshell, supra.* Although these cases typically speak in terms of privilege, the Reporter to the Advisory Committee on Rules of Evidence, Professor Edward W. Cleary, has suggested that they

> "could be bottomed more solidly on considerations of relevance than on privilege. The situation resembles the doctrine of merger by verdict, in which the decisions, arguments, positions and statements of petit jurors simply become irrelevant." Hearings on Proposed Rules, *supra* at 577.

It sometimes happens, however, that what is at stake in litigation is not only the correctness of an agency's decisions, but also the validity of the decision-making process itself. Compare *Carl Zeiss, supra,* 40 F.R.D. at 329.

> "In these cases, usually involving claims of abuse of discretion, consultative memoranda may well acquire relevancy. Courts have recognized the distinction, although not always in the language of relevancy." Hearings on Proposed Rules, *supra* at 577.

Thus in cases in which there is reason to believe that the agency officials acted in a fraudulent or otherwise illegal manner in reaching decisions affecting one of the litigants, production of intra-agency memoranda of a consultative nature has been ordered over objections of privilege. *Ibid; Olson Rug Company v. NLRB,* 291 F.2d 655 (7th Cir. 1961); *Olsen v. Camp,* 328 F. Supp. 728 (E.D. Mich. 1970); *Bank of Dearborn v. Saxon,* 244 F. Supp. 394 (E.D. Mich. 1965),

aff'd 388 F.2d 496 (6th Cir. 1967). In the case at bar, of course, it is precisely defendants' decision-making procedures—and *only* those procedures—which are at stake; in fact, no administrative decision is challenged and sought to be overturned by this litigation.

Third, it is appropriate for this Court to consider "the seriousness of this litigation * * *." *Freeman v. Seligson,* 405 F.2d 1326, 1340 (D.C. Cir. 1968). For this case does not present, as do almost all of those in which the qualified privilege for official information has been upheld, the situation in which a private citizen seeks only to advance his own pecuniary interests through the litigation. Rather, this is a class action maintained by plaintiffs under the Civil Rights Act to determine the constitutionality of the procedures followed by the state's parole board. "It follows that only strong public policies should be permitted to prevent disclosure, particularly in suits under Section 1983 where enforcement of the statute is placed solely in the hands of individual citizens acting in the capacity of 'private attorneys general'." *Gaison v. Scott,* 59 F.R.D. 347, 352 (D. Ha. 1973); see also *Wood v. Brier, supra,* 54 F.R.D. at 10-11. "It would seem that the real public interest under such circumstances is not the agency's interest in its administration, but the citizen's interest in due process." *Bank of Dearborn v. Saxon, supra,* 244 F. Supp. at 402.

Fourth, it has been noted that in many cases in which the privilege was upheld the court was persuaded by the fact that "[s]ince the Government is not a party to the * * * action, no problem of unfair

litigating advantage is presented." *Carl Zeiss, supra,* 40 F.R.D. at 329, and cases cited. Thus the courts "have been more inclined to recognize executive privilege in litigation between private parties than in actions in which the Government is a party." 8 Wright & Miller, *supra,* §2019 at 173, and authorities cited at n. 30. Again, this case presents an excellent example of the principle, for here counsel for defendants have complete access to *all* of the documents at issue, as well as all other documents maintained by the Department of Corrections and the Adult Authority, and which they typically utilize in litigation which they are defending.[35] To deny that material to plaintiffs, while defendants make free use of it, is manifestly unfair.

In conclusion, we do not disagree with the general principle—as a general principle—that the decision-making processes of the various branches of government must be afforded a certain amount of confidentiality; and that routine disclosure of intra-agency memoranda of an advisory nature can prove harmful to the consultative functions of government. We do, however, point out that this is not an FOIA case, involving a plaintiff who may not even need the document but, once he has it, may use it in any way he wishes; or a defendant government agency whose refusal to disclose the documents requested could not be motivated by the desire to obtain (and does not in fact result in the government obtaining) an unfair litigating advantage. Rather, it is a case in

[35]See note 31, *supra*.

which (i) it is plaintiffs, as private attorneys general, who seek to vindicate the public interest by obtaining a fully informed decision concerning the constitutionality of the state's parole board; (ii) the documents at issue are extremely relevant to proving the allegations concerning the illegalities of defendants' procedures; (iii) the agency involved has entirely failed to demonstrate that it would in fact incur any harm if disclosure is ultimately required; and (iv) the documents are to be produced under protective orders which will, as a practical matter, all but eliminate any harm which might otherwise result from their production. Under these circumstances, it is our submission that the District Court was entirely justified in issuing the discovery orders which were at issue in the court below. At the very least, it cannot be said that the issuance of those orders was such an abuse of discretion or a "usurpation of power" that it ought to have been overturned by way of mandamus in the court below. See Section IV, *infra*. Consequently the decision of the court below could properly be affirmed on the ground that those orders were correct and should have been complied with by defendants.

III

THE DECISION OF THE COURT BELOW, AND THE DISCOVERY ORDERS OF THE DISTRICT COURT, DO NOT VIOLATE ANY RIGHTS PROTECTED BY THE FOURTH AMENDMENT.

Defendants' Fourth Amendment argument is a novel one in at least two respects. First, it seeks to transform the Fourth Amendment—long considered

a fundamental protection of the people against the government—into a protection for the government itself. And secondly, it seeks to apply the Fourth Amendment to the discovery of documents under the Federal Rules of Civil Procedure. Significantly, defendants cite not a single case which supports either proposition, nor has our research uncovered one. But in addition to an absence of authority, defendants' argument simply will not bear the weight of analysis.

This Court has, of course, examined the history and purposes of the Fourth Amendment "on many occasions." *Warden v. Hayden,* 387 U.S. 294, 301 (1967), and cases cited. In doing so it has noted that the Fourth Amendment

> "was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,' (Citation omitted), from searches under indiscriminate, general authority. Protection of these interests was assured by prohibiting all 'unreasonable' searches and seizures, and by requiring the use of warrants, which particularly describe 'the place to be searched, and the persons or things to be seized,' thereby interposing 'a magistrate between the citizen and the police' * * *." *Warden v. Hayden, supra,* 387 U.S. at 301.

Thus the amendment, which by its terms protects the "right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (emphasis supplied), has long been applied by the courts to protect individuals and

their private papers from governmental intrusion. See, *e.g., Wilson v. U.S.,* 221 U.S. 361 (1911); *Hale v. Henkel,* 201 U.S. 43 (1906). Defendants fail entirely to show that the amendment was initially enacted, or has ever been construed, to afford similar protection to the government against individuals seeking official documents for use in litigation. Consequently, the short answer to defendants' argument is that the government simply has no standing to assert any rights afforded by the Fourth Amendment.

So far as defendants seek to invoke the Fourth Amendment rights of specific individuals, it is unlikely that they are legally able to do so, since the rights assured by the Fourth Amendment are personal to those who hold them. *Cf. Simmons v. United States,* 390 U.S. 377, 389 (1968). But even assuming *arguendo* that under some circumstances the government could assert the Fourth Amendment rights of its citizens, defendants have utterly failed to allege, in the courts below or in this Court, who those individuals are and what injury they are likely to incur as a result of the discovery which the District Court ordered. Such a failure to allege, in the District Court, concrete injury to specific individuals, makes defendants' assertion of Fourth Amendment rights at best premature. See *California Bankers Association v. Schultz,* 416 U.S. 21 (1974) where, in an analogous situation, this Court held that "[i]t will be time enough for us to determine what, if any, relief from the reporting requirement they may obtain in a judicial proceeding when they have properly and specifically raised a claim of privilege with respect to particular items of information required by the Secretary, and the Secretary has overruled their claim of privilege." *Id.* at 73. See also *United States v. Morton Salt Co.,* 338 U.S. 632, 653-54 (1950).

But in addition to making the requisite *allegations,* a person asserting a violation of his Fourth Amendment rights in civil litigation must also support that allegation with a proper *showing.* Thus in *United States v. Morton Salt Co., supra,* where a corporation was resisting, on Fourth Amendment grounds, an FTC subpoena requiring the production of certain corporate documents, this Court held that

> "[b]efore the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions. * * * If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, *matters which now rest on mere assertions in their briefs.* The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, *at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it."* *Id.* at 653-54 (emphasis supplied).

Here, of course, defendants' claim of privilege and their request for an *in camera* inspection were never supported by anything more substantial than "mere

assertions in their briefs", as we have shown at pages 33-60, *supra*.[36]

It is our further submission, however, that no such claim *could* be properly raised, at least in the circumstances of this case, because persons who voluntarily give information to the government do not have the type of interest protected by the Fourth Amendment. Such protection is generally reserved to one who has "been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or

[36]Defendants also attempt to liken a Rule 37 order compelling the production of documents in a civil case to a general search warrant, and the refusal of the District Court to conduct an *in camera* inspection to the failure of a magistrate to read an affidavit submitted in support of a search warrant. The basic flaw in this effort is that the purposes for, and consequences of, the issuance of a search warrant to the police are quite different than those which prevail in civil litigation where a court orders production of documents under Rules 34 and 37 of the Federal Rules of Civil Procedure. A search warrant is typically obtained through an *ex parte* proceeding, and permits police to unexpectedly enter a citizen's dwelling or office and there search for evidence which can be used in prosecuting its owner or possessor for the commission of a crime. In such a situation it is clearly reasonable to require a detailed description of the property sought, and to place the burden of showing the necessity of the search upon the government. By contrast, a Rule 34 request for production of documents (or a Rule 45 subpoena) gives an answering party ample time to review the documents sought and then, in his discretion, to invoke any applicable privilege or to seek a protective order under Rule 26. Moreover, the documents whose production is compelled under Rule 37 are not ordinarily used—as they will not be used in this case—for purposes of criminal prosecution; and where, as here, they are produced pursuant to protective orders, whatever harm might result from their production is even further diluted. Accordingly, to judge the legal validity of a Rule 37 proceeding by the standards typically employed in the issuance of search warrants is like trying to insert a round peg into a square hole. The two simply are not fungible, nor should they be, and for this reason also defendants' argument must fail.

seizure directed at someone else." *Jones v. United States,* 362 U.S. 257, 261 (1960); *cf. Couch v. United States,* 409 U.S. 322, 331 (1973). Here, however, there is no claim that the hypothetical individuals whose Fourth Amendment rights defendants seek to raise have such an interest in the admittedly public documents here at issue; rather, the vague and undefined harm to which disclosure allegedly subjects them would result solely from the use of information obtained from someone else.

Moreover, as defendants acknowledge, the Fourth Amendment applies only to the extent that a person has a reasonable expectation of privacy. See *Katz v. United States,* 389 U.S. 347 (1967). In a similar situation, this Court held that a person who voluntarily gave information to her accountant could not claim, for Fourth Amendment purposes, an expectation of potential privacy or confidentiality. *Couch v. United States, supra,* 409 U.S. at 335-36. There, as here, information was given to another in the knowledge that the recipient was likely to disclose much of it, and that "[w]hat information is not disclosed is largely in the accountant's discretion, not petitioner's." *Id.* at 335. Just that situation existed in this case, of course, since persons giving information to the government know, or should know, that the government will utilize it as it sees fit, and may disclose it to a number of individuals in a variety of situations, including court-ordered discovery. Therefore, as this Court has said in words wholly applicable to the case at bar, no Fourth Amendment claim can prevail when "there exists no legitimate expecta-

tion of privacy and no semblance of governmental compulsion against the person of the accused." *Id.* at 336.

Beyond that, it is well established that the Fourth Amendment was designed "for protection against *official* invasion of privacy and the security of property." *Jones v. United States, supra,* 362 U.S. at 261 (emphasis supplied).

> "Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen * * *." *Burdeau v. McDowell,* 256 U.S. 465, 475 (1921).

In this case the "seizure", although compelled by a Federal court, operates to place public documents in the hands of private citizens for use in suing the government, rather than placing them in the hands of the government for use against its citizens. For this reason also, the persons on whose behalf defendants seek to invoke the Fourth Amendment do not have the type of interest which the law requires. *Cf. Shapiro v. United States,* 335 U.S. 1 (1948).

But even if the government did have standing here to assert a Fourth Amendment right, either on its own behalf or on behalf of some unnamed third parties from whom it received confidential information, defendants' position is still untenable. For as they concede, no Fourth Amendment violation can be said

to have occurred if the District Court, in ordering disclosure of these documents, correctly concluded that the need for their disclosure in the litigation outweighed the harm that such disclosure might cause. *Cf. Branzburg v. Hayes,* 408 U.S. 665 (1972). "The gist of the protection is in the requirement, expressed in terms, that the disclosures sought shall not be unreasonable * * *." *Okla. Press Pub. Co. v. Walling,* 327 U.S. 186, 208 (1946). Therefore we fail to see how defendants' Fourth Amendment argument strengthens their position in this Court, since if the District Court did correctly order disclosure despite defendants' claim of governmental privilege, the order was necessarily "reasonable" within the meaning of the Fourth Amendment.

To summarize, then, it is our submission that neither the government nor the unnamed individuals who may have supplied information to the CDC or to the Adult Authority have standing, under the circumstances of this case, to invoke the protection of the Fourth Amendment. Even if they did, defendants' utter failure to specifically allege or thereafter demonstrate the harm which would in fact occur from disclosure disqualifies them from seeking the aid of the Fourth Amendment. And, since the discovery orders of the District Court were eminently reasonable, no Fourth Amendment violation could have occurred, even if the issues of standing and proof were to be resolved in defendants' favor. Hence defendants' Fourth Amendment argument is entirely without merit, and should be rejected by this Court.

IV

BECAUSE THE DISCOVERY ORDERS OF THE DISTRICT COURT DO NOT CONSTITUTE A USURPATION OF POWER OR A CLEAR ABUSE OF DISCRETION, THE COURT BELOW PROPERLY REFUSED TO ISSUE A WRIT OF MANDAMUS.

Since discovery orders are not generally appealable (see 8 Wright & Miller, *supra,* §2066 at 29, and cases cited at n. 63), defendants petitioned the court below for a writ of mandamus. Yet the limitations placed upon the extraordinary writ of mandamus by this Court make it clear that issuance of the writ would not have been proper.

We begin with this Court's often expressed reluctance to "thwart the Congressional policy against piecemeal appeals." *Will v. United States,* 389 U.S. 90, 104 (1967). Since "it is established that the extraordinary writs cannot be used as substitutes for appeals," *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953), it is not enough for a party seeking mandamus to show that the trial court entered orders which were merely erroneous. *Will v. United States, supra; Bankers Life & Casualty Co. v. Holland, supra.*[37]

[37]The ruling on a question of law decisive of the issue presented by • • • [plaintiffs'] motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. (Citations omitted.) Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, (citation omitted), and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the

Instead this Court has characterized mandamus as being "drastic and extraordinary" in nature, *id.* at 106, one which should be "reserved for really extraordinary causes." *Ex Parte Fahey,* 332 U.S. 258, 260 (1947).

Although the language employed to describe the proper limitations of mandamus is usually broad and often vague, it would appear that at least two essential elements must be present for the writ to issue. The first is that the trial court must have exceeded or refused to exercise its jurisdiction. *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). Thus mandamus is to be reserved for circumstances amounting to "judicial usurpation of power," *Will v. United States, supra,* 389 U.S. at 95, or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland, supra,* 346 U.S. at 383. Stated differently, the writ should issue only when the right to such relief is "clear and indisputable." *Will v. United States, supra,* 398 U.S. at 96.

The second element which an applicant for mandamus must demonstrate is the likelihood that he will suffer extraordinary injury if the writ does not issue. That burden is not met, however, by adverting to the

All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeals, Congress must have realized that in the course of judicial decisions some interlocutory orders might be erroneous." *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 382-83 (1953).

"hardship [which] may result from delay and perhaps unnecessary trial." *Bankers Life & Casualty Co. v. Holland, supra,* 346 U.S. at 383. Nor is mandamus appropriate simply because, as here, a party will otherwise be forced to undergo "the full and vigorous discovery that a large, system-wide class action anticipates." *In re Estelle,* 516 F.2d 480, 484 (5th Cir. 1975).

Finally, we note that "the party seeking mandamus has the burden of *showing* that its right to issuance of the writ is 'clear and indisputable.'" *Will v. United States, supra,* 389 U.S. at 96 (emphasis supplied). Such a showing must, of course, be based upon the record in the District Court, not upon mere assertions of counsel. *Id.* at 102-104.

It is our submission that application of these principles to the situation at bar furnishes yet another ground upon which to affirm the decision of the court below. As we have argued in the preceding sections of this brief, defendants never did demonstrate to the court what documents were involved, or what harm would occur to what individuals, or to what governmental functions, if discovery proceeded as ordered, pursuant to the protective orders. And, in addition to defendants' failure to make the requisite showing of harm, we have also shown that the discovery orders of the District Court were quite reasonable and clearly correct. Such matters involving discovery are peculiarly within the discretion of the trial judge, and in exercising it the judge in this case was careful to condition disclosure upon adherence, by plaintiffs' counsel, to strict protective orders.

But even if, *arguendo,* these orders are erroneous, the limited discovery they order, subject to the restrictions of the protective orders, clearly does not rise to the level of a "usurpation of power," or a "clear abuse of discretion." Defendants plainly admit, as they must, that the privilege for official information is a qualified one, requiring the trial judge to strike a balance between disclosure and confidentiality. "Thus the most that can be claimed on this record is that * * * [the District Court] may have erred in ruling on matters within his jurisdiction," *Will v. United States, supra,* 389 U.S. at 103-04, and the "extraordinary writs do not reach to such cases * * *." *Ibid.* On this ground alone, then, it would be proper to affirm the decision of the court below.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request this Court to affirm the decision of the court below, either for the reasons set forth in that court's opinion or on the ground that the orders issued by the District Court, dated June 20, 1974, and December 3, 1974, are correct and should be complied with by petitioners. Should this Court reverse the decision below on the ground that the District Court ought to have conducted an *in camera* inspection of the documents in question, we urge this Court to set forth detailed guidelines, such as those discussed at pages 56-60, *supra,* to govern such inspections. Those guidelines should require the party resisting production to make a detailed showing in support of the

claimed privilege and should permit counsel for the discovering party to have meaningful *in camera* access to the documents for purposes of making an informed, adversary presentation on the issues of relevancy and privilege.

Dated: September 15, 1975.

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Attorneys for Respondents
John van Geldern, et al., Real Parties in Interest.

(Appendices Follow)

APPENDIX

Appendix A

State of California
Memorandum

Health and Welfare Agency
Date: May 11, 1973
File No.:

Subject: Adult Authority Hearing
During April, 1973

To: Mr. R. K. Procunier
Director of Corrections

Mr. Henry W. Kerr
Chairman, Adult Authority

From: Department of Corrections,
Sacramento 95814
Marie Vida Ryan, Senior Statistician
Administrative Information
& Statistics Section

For the first time in over five years, fewer than 20 percent of the male felons heard by the Adult Authority received release dates. Only 265 of the 1,493 men heard in April were granted release dates.

Almost 60 percent of the 265 men with dates set during April were to be released within six months following the date of hearing. Over one-third (34.4 percent) received release dates effective during the 7-12 month period after hearing while the remaining 6.4 percent received dates 13 months or more away from hearing date.

While the number of men with release dates continued to drop, the male felon institution population

continued to rise, causing the percentage of male felons with release dates as of April 30 to fall to a low of 16.5 percent. Of the 17,465 men in the institutions at the end of April, only 2,873 had dates.

Marie Vida Ryan
/s/ Marie Vida Ryan
Senior Statistician

MVR:mg
Attachments

cc: A. A. Members and Reps.
Executive Staff
Research Division

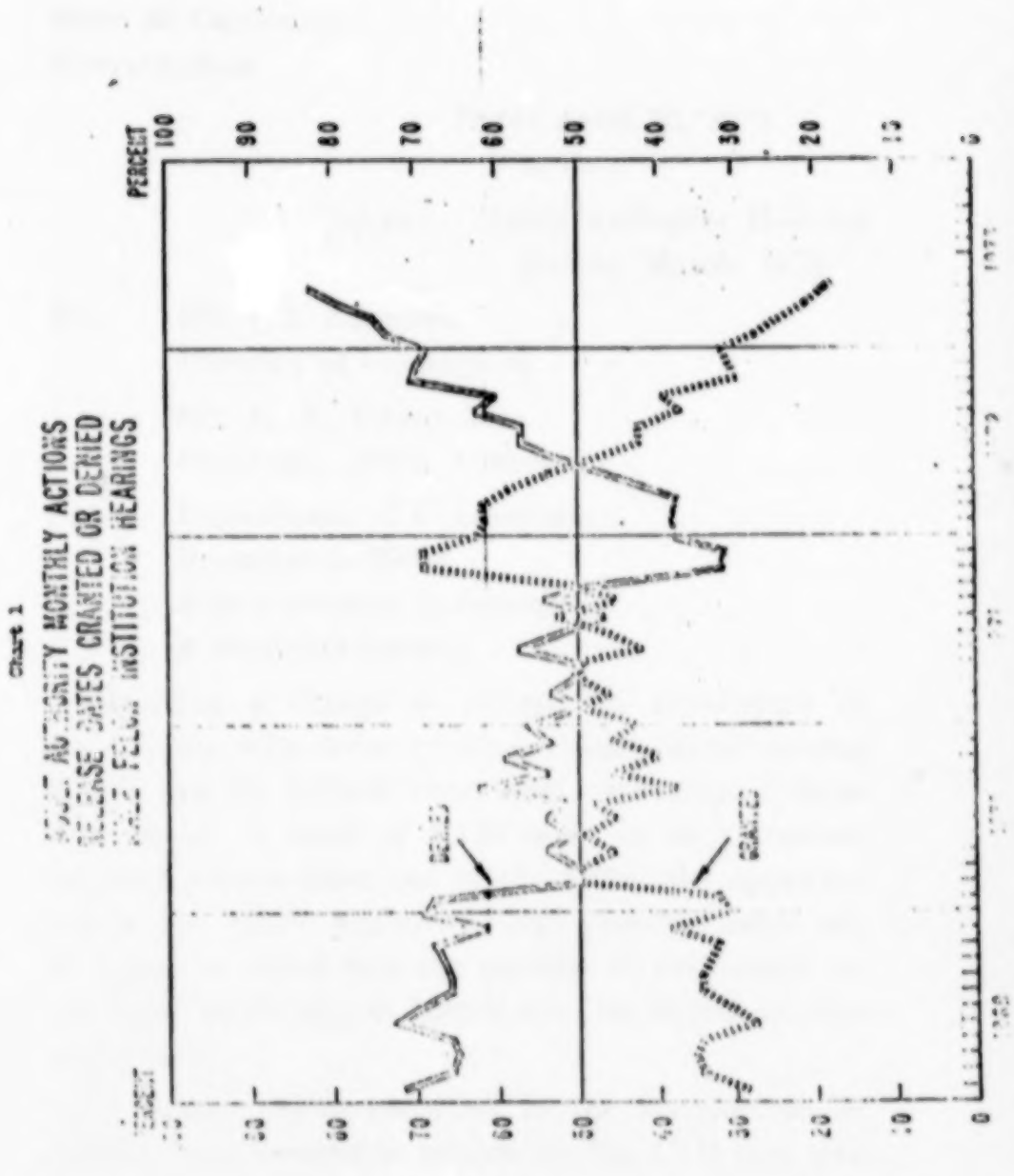


Chart 1

Appendix B

State of California
Memorandum

Date: April 25, 1973
File No.:

Subject: Adult Authority Hearing
During March, 1973

To: Mr. J. J. Enomoto
Director of Corrections

Mr. R. K. Procunier
Chairman, Adult Authority

From: Department of Corrections,
Sacramento 95814
Administrative Information
& Statistics Section

Reflecting a change in policy, the percentage of male felons who were granted release dates during March was the highest ever, since reporting of these data began. A total of 1,732 men, or 88.5 percent, received release dates out of the 1,958 who appeared before the Adult Authority with possible dates set. It should be noted that the number of men heard by the Adult Authority in March was the largest in over four years.

Significant shifts occurred in the distribution of months from hearing to release for the 1,732 men who were granted dates in March compared to prior months. Increases may be observed in the percentage of male felons receiving dates effective 13-18 months

and 19 months or more following their hearings. The off-setting decreases are within these groups scheduled for release 4-6 months and 7-9 months following date of hearing.

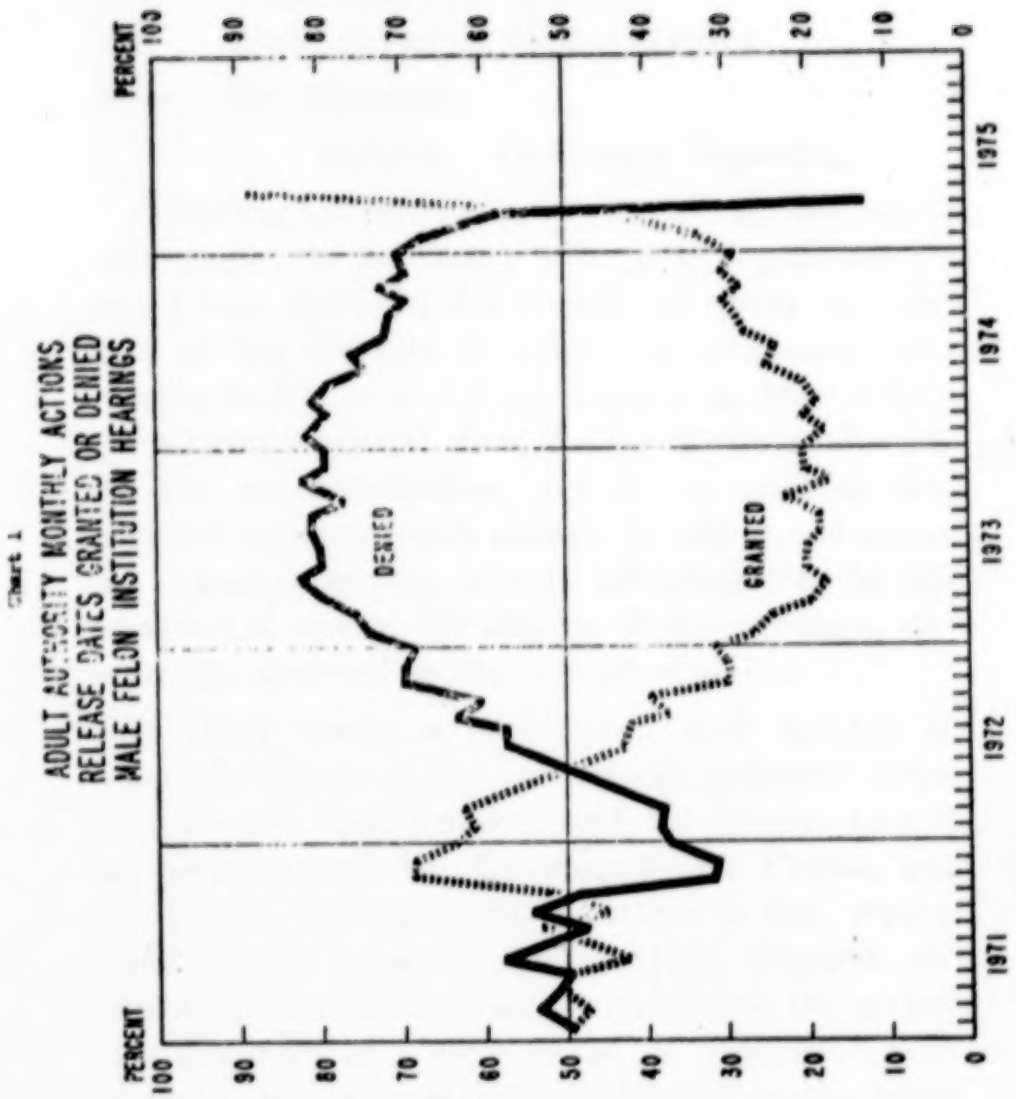
The male felon institution population numbered 21,548 on March 31, 1975, of which 3,722 men (17.3 percent) had release dates. Within six months, 56.9 percent of those with date as of the end of March should be released, compared to 71.2 percent as of the end of February. The percentages for those men holding dates more than 12 months away, as of the end of February and of March, are 4.6 percent and 19.8 percent, respectively.

Despite all of these changes, the median time from hearing to release for the 1,187 male felons set for first parole during the March calendar hearings remained at 42 months, the same as in February, 1975 and November, 1974. This median of 42 months was one month less than the 43 months set during the January 1974 calendar hearings for felons first paroled.

Marie Vida Ryan
/s/ Marie Vida Ryan
Senior Statistician

MVR:mg
Attachments

cc: A. A. Members and Reps.
Executive Staff
Research Division



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Appendix C

State of California
Memorandum

Date: February 5, 1971

To: Adult Authority Members
Adult Authority Representatives

From: The Chairman

Subject: Psychiatric Reporting

Following an expression of concern by the Board with respect to psychiatric and psychological reporting. I have discussed this matter informally with the staff of the Attorney General. They expressed their opinion that they do not see a major problem with a correctional counselor writing a psychiatric evaluation for the Adult Authority, provided a qualified psychiatrist or psychologist reviews the report and affixes his signature to that report, indicating that he has reviewed it, and by the affixing of the signature, signifies his approval to the report's contents.

In other words, a professional staff member at Vacaville who is in the correctional counselor series may prepare such a report with the proviso that it has been reviewed by (for example) Dr. Clanon, and Dr. Clanon has affixed his signature to that report, signifying his approval of its contents. Reports presented by correctional counselors without the review and signature of a psychiatrist or a qualified psychologist do not meet either the letter or the spirit of existing statutes.

/s/ Henry W. Kerr
Henry W. Kerr
Chairman, Adult Authority

HWK:kf
cc: Mr. R. K. Procunier